THE ETHICS OF INTERNATIONAL ANIMAL LAW

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Tiivistelmä - Referat – Abstract

This thesis analyzes international animal law, understood broadly as any international legal regulation pertaining to animals. The purpose of the thesis is to explain the moral implications of this branch of international law: how the law perceives the animal and how it believes animals ought to be treated. It attempts to do so by contrasting the law with moral philosophy pertaining to the status and treatment of animals as well as the core characteristics of the branch of animal law found in many contemporary societies.

International animal law does not conform to any single set of rules or principles. Rather, it comprises a wide range of human behavior in relation to animals, ranging from the use and management of natural resources to the treatment of animals in animal agriculture. What follows is that international animal law can, in broad terms, be divided into three spheres of regulation.

In the first sphere, animals are considered resources. The law here is about regulating the use and conservation of natural resources of the world, both terrestrial and marine. While some exceptions have been made in favor of certain animal species, this sphere of regulation is largely insensitive to any non-instrumental value animals could be seen as having. Moreover, the characterization of animals as resources leads to an absence of standards regulating how these resources should be treated as a practical matter. Under this sphere of international animal law, humans are justified in using animals as means to human ends, and that is the end of the matter: there is nothing that the law prescribes or proscribes in relation to the well-being of the used resources.

In the second sphere, international animal law takes an interest in certain animals as members of a particular species. Here, the main purpose of the law is to conserve and protect endangered species from extinction. This is given effect in many ways, such as regulating trade in endangered species or protecting the habitats of wild animals. While prima facie more compassionate than the viewing of animals as resources, it is clear that this branch of conservation law excludes most animals from consideration: for the most part, only those animals having unfavorable conservation status or otherwise in need of protection from conduct detrimental to their survival are deemed worthy of protection. The law of this sphere is also ultimately peripheral to most ways in which humans and animals interact as an empirical matter. In focusing on specific problems associated with specific species of animals, the law does not amount to any general rules and principles guiding human behavior in regard to animals.

Finally, the third sphere of international animal law conceives of animals as individuals. Largely associated with the concept of animal welfare, this sphere is interested in regulating how the well-being of individual animals should be taken into account in human practices. The law here is markedly sporadic, however. There are no legally binding global standards governing animal welfare. The most widespread and developed instruments in this regard are regional, and European states in particular have been active in ensuring the well-being of individual animals through international legal instruments. As this sphere of international animal law is mostly concerned about the welfare of animals in the context of their exploitation, it is largely in line with the philosophy of the theory of animal welfare, which animates most animal law in domestic jurisdictions. In practical terms, animals may be used instrumentally as long as they are treated 'humanely' and not subjected to 'unnecessary suffering'.

As it is clear that there is no single, unified body of international animal law, it is equally clear that there is no single set of moral principles behind its rules. The ethics of treating animals as resources are markedly different from the ethics of regulating animal welfare in animal agriculture. The common denominator of the three distinct spheres of the law, however, is that all of them ultimately promote the instrumental value of animals. As animals do not enjoy meaningful legal rights in any contemporary society, neither do they have legal rights under international law. International animal law, by and large, emphasizes animals' instrumental value, firmly rejecting, however implicitly, any notion of inherent value or moral rights.

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LIST OF ABBREVIATIONS

ABGB	Allgemeines bürgerliches Gesetzbuch
AVMA	American Veterinary Medical Association
BGB	Bürgerliches Gesetzbuch
CBD	Convention on biological diversity
CITES	Convention on international trade in endangered species of wild fauna and flora
CoE	Council of Europe
CUP	Cambridge University Press
ECR	European Court Reports
EEZ	Exclusive economic zone
ETS	European Treaty Series
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
Fla Stat	Florida Statutes
F Supp 2d	Federal Supplement, Second Series

GATT	General agreement on tariffs and trade
ICJ	International Court of Justice
ICJ statute	Statute of the International Court of Justice
ILM	International Legal Materials
IUCN	International Union for Conservation of Nature
IWC	International Whaling Commission
KJV	King James Version
LNTS	League of Nations Treaty Series
OIE	World Organization for Animal Health
OJ	Official Journal of the European Union
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
QBD	Queen's Bench Division
RIAA	Reports of International Arbitral Awards
RSPCA	Royal Society for the Prevention of Cruelty to Animals
SPS agreement	Agreement on the application of sanitary and phytosanitary measures
TierSchG	Tierschutzgesetz
UDAR	Universal Declaration of Animal Rights
UDAW	Universal Declaration on Animal Welfare
UN	United Nations
UNCLOS	United Nations convention on the law of the sea
UNGA	United Nations General Assembly
UNTC	United Nations Treaty Collection
UNTS	United Nations Treaty Series

VCLT	Vienna convention on the law of treaties
WTO	World Trade Organization

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I INTRODUCTION

> Is it not a reproach that man is a carnivorous animal? True, he can and does live, in a great measure, by preying on other animals; but this is a miserable way,—as any one who will go to snaring rabbits, or slaughtering lambs, may learn,—and he will be regarded as a benefactor of his race who shall teach man to confine himself to a more innocent and wholesome diet. Whatever my own practice may be, I have no doubt that it is a part of the destiny of the human race, in its gradual improvement, to leave off eating animals, as surely as the savage tribes have left off eating each other when they came in contact with the more civilized.[1]

It is difficult to resist the conclusion that Thoreau's vision is hardly closer to realization today than it was during his lifetime. If anything, human exploitation of animals is more prevalent now than ever before in recorded history. To give the phenomenon some sense of scale, 2011 statistics from the Food and Agriculture Organization of the United Nations evidence that the global amount of terrestrial animals slaughtered that year was roughly 64 billion[2]. The total world catch of fish was estimated to be 90 million tonnes as early as 1992[3], and the level of

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[1] Henry David Thoreau, *Walden; or, life in the woods* (Ticknor and Fields 1854) 232.

[2] FAO, 'Global livestock production and health atlas' <http://kids.fao.org/glipha/> accessed 10 July 2014. The estimated figure of 64 billion consists of 24 million buffaloes, 1.6 million camels, 293 million cattle, 57 billion chickens, 2.9 billion ducks, 649 million geese, 410 million goats, 4.5 million horses, 484 million sheep, 656 million turkeys, and, since the 2011 statistics do not account for asses, mules, and pigs but the 2010 statistics do, an estimate of (assuming no growth between 2010 and 2011) 2.4 million asses, 561 million mules, and 1.3 billion pigs.

[3] Patricia Birnie and Alan Boyle, *International law and the environment* (2nd edn, OUP 2002) 646.

exploitation has remained more or less steady since[4]. A 2008 report estimated that the total amount of animals involved in scientific research and related practices was in the range of 115 million in 2005, uses varying from tissue supply and the maintaining of breeding colonies to killing surplus specimens insofar as the amount bred exceeds requirements[5]. Ultimately, of course, animal exploitation is not only about the numbers. Few would praise modern intensive farming methods as compassionate or conducive to a high standard of animal welfare (a flexible concept in itself, as we shall see). Most animals involved in so-called factory farming never spend time outdoors and are generally incapable of engaging in behavior natural to their species.[6] All things considered, it is fair to say that human societies thrive on the exploitation of animals, and nothing suggests that the amount of animals used as means for human ends would be on the decline.

However, as the introduction of so-called anticruelty and animal welfare laws[7] and their continuing prevalence suggests, some holds *are* barred today. As we shall see, such laws began to enter the stage during the 19th century and were greatly inspired by utilitarian philosophy, Jeremy Bentham's works in particular. But we shall also see that the moral underpinnings of these laws are increasingly being called into question by contemporary philosophers, lawyers, and animal activists. Radical two hundred years ago, they now represent a mode of thought that, while still alive and well in contemporary societies and legal systems, is increasingly considered outdated and in dire need of reform or, more dramatically, complete abolition.

The regulation of animal exploitation, health, and welfare is not limited to domestic law. As early as the 1930's, treaties were concluded to address, for example, the international transit of animals and animal products[8]. These treaties, however, focused largely on preventing the

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[4] See FAO, 'Fish, crustaceans, molluscs, etc—world capture production' <ftp://ftp.fao.org/FI/STAT/summary/a1a.pdf> accessed 16 August 2014.

[5] See generally Katy Taylor and others, 'Estimates for worldwide laboratory animal use in 2005' (2008) 36 Alternatives to Laboratory Animals 327.

[6] Gaverick Matheny and Cheryl Leahy, 'Farm-animal welfare, legislation, and trade' (2007) 70 Law and Contemporary Problems 325, 326, 329.

[7] In broad terms, anticruelty laws impose negative obligations to refrain from certain kinds of acts (eg infliction of gratuitous suffering) whereas welfare laws impose positive obligations (prima facie) conducive to a high standard of well-being. See Mike Radford, *Animal welfare law in Britain : regulation and responsibility* (OUP 2001) 6; Joan E Schaffner, *An introduction to animals and the law* (Palgrave Macmillan 2011) 71; Visa Kurki, 'Tarvitaanko eläinten oikeuksia? Eläinten oikeussubjektiviteetin mahdollisuus ja hyödyt' (LLM thesis, Edita Publishing 2012) 16–7.

[8] See International convention concerning the transit of animals, meat and other products of animal origin (adopted 20 February 1935, entered into force 6 December 1938) 193 LNTS 37; International convention concerning the export and import of animal products (other than meat, meat preparations, fresh animal products, milk and milk products) (adopted 20 February 1935, entered into force 6 December 1938) 193 LNTS 59.

spreading of animal diseases and, due to the low number of ratifications they received, never became truly significant in their own right[9]. Since then, the scope of regulation has expanded considerably. Today, international law regulates not only some of the most economically lucrative forms of exploitation such as fishing but also the protection of habitats, the conservation of both individual and groups of animal species, and biological diversity in general.

It is important to understand, however, that law is not the only normative system that takes an interest in the treatment of animals. More than two thousand years of moral philosophy on the point serves to evidence that normative principles and guidelines existed long before the law became concerned with the pain and suffering of nonhuman life. Despite the insuperable gap that prima facie sets law apart from morals, it is clear, as will be discussed later in this thesis, that the law, as it pertains to animals, has at every turn been both inspired and informed by moral philosophy. From absence of any safeguards to prohibiting certain forms of exploitation unconditionally, animal law has always reflected the dominant moral ideologies contemporary with it.

Some, like Hans Kelsen, believe that the role of a legal scientist is merely to 'know and describe' the law, not to 'justify [it] by absolute or relative morals'[10]. Others leave room for critique on moral grounds even as they hold that law is law even if it happens to be immoral[11]. A lawyer, in the strictest sense of the word, may be comfortable in confining herself within the sphere of law while excluding all moral considerations, but not *all* lawyers—much less moral philosophers and animal activists—choose to respect such boundaries. Besides, there is good reason to believe that international law itself must, as Donald Childress would say, 'be self-critical and seek to evaluate the ethical ground from which it springs.'[12] I believe there is a need not only to study the black letter of international animal law, but also the moral underpinnings and implications of its rules. To interpret and systematize these rules wholly apart from morals will only result in half a picture. A comprehensive view requires that one expands the scope of inquiry to also include the questions of how international law views

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[9] See MJ Bowman, 'The protection of animals under international law' (1988–1989) 4 Connecticut Journal of International Law 487, 489.
[10] Hans Kelsen, *Pure theory of law* (Max Knight tr, Lawbook Exchange 2005) 68–9.
[11] See HLA Hart, 'Positivism and the separation of law and morals' (1957) 71 Harvard Law Review 593, 618; HLA Hart, *The concept of law* (2nd edn, OUP 1994) 203, 210.
[12] Donald Earl Childress III, 'Introduction' in Donald Earl Childress III (ed), *The role of ethics in international law* (CUP 2012) 4.

nonhuman animals, what it considers an acceptable standard for their treatment, and what moral implications follow.

Grounding myself on animal ethics and animal law, I argue that international animal law, if such a branch can be said to exist, is not a unified and consistent field of public international law, but rather a body of overlapping spheres of regulation that take wildly differing perspectives to what animals are, why they are of interest, and how they ought to be treated. From labeling nonhuman life 'natural resources' to protecting individual farm animals from improper treatment, international animal law comprises an ever-growing number of treaties and other legal instruments regulating a wide range of practices involving animals. What is common to this otherwise diverse body of regulation, however, is that the law, by and large, views animals as things that may be used instrumentally to satisfy human interests. Apart from some high-minded declarations and preamble recitals, nothing in international animal law currently serves to suggest that animals would have inherent value regardless of their utility to humans or rights of any kind.

Research question

This thesis, as its very title suggests, is a study of the ethics of international animal law—its attitude towards nonhuman life, its debt to moral philosophy, the moral implications of its rules and institutions. The central research question that has informed my work is this: *does international animal law conform to moral philosophy regarding animals, and if so, how?*

Answering this question requires, firstly, a firm footing in moral philosophy—as William Ewald once implied, albeit in a context very different from the present one, one cannot truly understand a legal system without inquiring into the philosophical principles lying behind its rules[13]. From ancient Greece to contemporary America, and practically any imaginable time and place in between, philosophers have sought to understand what animals are, how they differ from us, and how they should be treated. The body of literature existing on these points is vast and continues to expand at a rate that would hardly have been conceivable a few decades (much less centuries) ago. The purpose here is to draw from this literature, but not to contribute to it. There is no reason to believe that any particular philosopher would thus far have gotten the final word in the debate; the fact that one of the most influential contributions

[13] cf William Ewald, 'Comparative jurisprudence (I): what was it like to try a rat?' (1994–1995) 143 University of Pennsylvania Law Review 1889, 1896.

of the 20th century, Tom Regan's *The case for animal rights*—a book responsible for inspiring immense amounts of literature on the concept of moral rights of animals— was published no longer than three decades ago underlines this point well. There is no reason to believe that moral philosophy pertaining to animals would be fully developed so as to exclude the possibility of new approaches and theories. Yet while it is possible to formulate something new still, this is not the place for it.

Secondly, a firm footing in *animal law* is required. This relatively new subject of academic interest has expanded greatly over the last two decades or so. As Joyce Tischler has noted, the amount of animal law classes taught in American law schools increased from about ten in 2000 to almost one-and-a-half hundred in 2012[14]. Gary Francione has made a similar observation, noting that there is an ever-growing scholarly interest in animal matters[15]. Today, animal law is taught at roughly a hundred law schools in the United States and also in a number of other countries as culturally and politically diverse as China, Israel, and the United Kingdom[16]. No Finnish university, surprisingly, offers courses in the subject—an unfortunate shortcoming hopefully to be rectified in the years to come. Moreover, while the first-ever academic journal on animal law, Lewis & Clark Law School's Animal Law, was founded in 1994, today a much greater number of journals contribute to legal scholarship and academic debate on the subject, the most recent addition being the Global Journal of Animal Law from the University of Turku, Finland. Yet here, too, my purpose is merely to draw from existing literature insofar as is relevant for my argument without making any contributions of my own. The intricacies of animal law are best understood when analyzed in the light of moral philosophy; these two, combined, will allow me to carry out my primary research task, which is to understand the ethics of international animal law.

As literature on animal law continues to proliferate, there is surprisingly little literature on *international* animal law. Few works concentrate on *animals* per se[17]; for the most part, the status and treatment of animals is subsumed under a broader topic such as conservation of natural

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[14] Joyce Tischler, 'A brief history of animal law, part II (1985–2011)' (2012) 5 Stanford Journal of Animal Law and Policy 27, 37.
[15] See Gary L Francione, 'Reflections on *Animals, property, and the law* and *Rain without thunder*' (2007) 70 Law and Contemporary Problems 9, 47.
[16] See Ed Mussawir and Yoriko Otomo, 'Law's animal' in Yoriko Otomo and Ed Mussawir (eds), *Law and the question of the animal : a critical jurisprudence* (Routledge 2013) 1.
[17] See eg Bowman, 'The protection of animals under international law' (n 9) who contemplates the lack of a truly global instrument comprehensively regulating animal welfare, and Catherine Sykes, 'The beasts in the jungle: animal welfare in international law' (LLM thesis, Dalhousie University 2011), who explores the legal status of a 'humane treatment principle'.

resources, biological diversity, or international environmental law in general[18]. Consequently, animals are rarely considered at a micro level. Instead of focusing on individual specimens, animals are referred to through their species or simply as natural resources. This is understandable, of course, as international law is first and foremost a system governing the conduct of sovereign states[19]. Since the legal order adopts a (prima facie) macro-level perspective already in regard to its subjects[20], it is only natural that the same scope is maintained as regards the objects of its rules. Still, the general failure of international law (and scholarship thereof) to conceive of animals as individuals runs the risk of blinding the spectator from the micro-level implications of its rules. As a matter of morals, individuals *do* matter.

A macro-level perspective in regard to animals entails that inquiries into the moral aspects of international animal law similarly avoid asking how individual animals ought to be treated. Much of the discussion seems to revolve around thoughts on whether certain species are 'different' enough to justify better (or worse) treatment[21]. Some, because animals can be understood as part of the environment or biological diversity, approach the topic through environmental ethics[22]. The few who draw more directly from the terminology and theory of animal ethics generally limit the scope of their inquiry to one particular legal instrument or species of animal[23]. During my work, I have found no contributions that would read international animal law together with the whole range of moral theories on animals and the core tenets of animal law to, as I seek to do, unveil from where the law derives its inspiration. Nor have I discovered any materials that would seek to make a case on the ethics of international animal law *as a whole*, that is, making generalizations so as to present how the international legal system views animals and the ethics of their treatment in broad terms, beyond the confines of any single context, legal instrument, or species. Existing literature on international animal law does not, therefore, answer the research question of this thesis. In

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[18] Eg Birnie and Boyle (n 3); Alexander Gillespie, *Conservation, biodiversity and international law* (Edward Elgar 2011).
[19] See *SS 'Lotus' (France v Turkey)* PCIJ Rep Series A No 10, 18.
[20] Prima facie because, as some scholars have argued, individual human beings could (and perhaps also *should*) be considered subjects of international law. See Hersch Lauterpacht, *International law and human rights* (Stevens & Sons 1950) 72 as cited in Robert McCorquodale, 'The individual and the international legal system' in Malcolm D Evans (ed), *International law* (3rd edn, OUP 2010) 287.
[21] See Erik Jaap Molenaar, 'Marine mammals: the role of ethics and ecosystem considerations' (2003) 6 Journal of International Wildlife Law and Policy 31, 35; Gillespie, *Conservation, biodiversity and international law* (n 18) 139–42.
[22] See generally Christopher D Stone, 'Ethics and international environmental law' in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford handbook of international environmental law* (OUP 2007).
[23] Eg Nina Nordström and others, *Johdatus kansainväliseen ympäristöoikeuteen* (Lakimiesliiton Kustannus 1994) 76; Alexander Gillespie, 'Whaling under a scientific auspice: the ethics of scientific research whaling operations' (2000) 3 Journal of International Wildlife Law and Policy 1.

seeking to answer that question, the present work attempts to fill a gap in existing knowledge by assuming a perspective that is mindful of the fact that animals *are* individual life forms the treatment of which has moral implications[24]. In doing so, it seeks to offer a contribution to our current understanding of international law by explaining what the rules of that system mean for animals, both at the micro and macro levels.

Method and sources

It must be admitted from the outset that this is a *positivist* thesis. 'The existence of a law is one thing: its merits or demerits are another', as John Austin once observed—it is one thing, then, to inquire what the law *is*, but a wholly different matter to inquire what it *ought* to be[25]. To embrace the separation of law and morals of classical positivist theory does not, as was noted above, preclude one from judging the law on moral grounds[26]. It is simply to accept the postulate that law is valid regardless of its conformity to moral standards. Immoral laws *may* exist, though which set of moral principles should be used as the yardstick is a matter open to debate.[27] What is permissible under the law might not conform to moral principles, and vice versa[28].

While morals may be inconsequential for the validity of law, there is *some* connection between the two, on this many agree[29]. Some hold that the law is influenced by moral attitudes[30], others turn the matter around and stress the former's capacity to influence change in the latter[31]. Moreover, there is considerable variety in how legal scholars approach questions concerning the ethics of a particular branch of law, and no single view seems to have a monopoly on how these two prima facie distinct concepts are to be reconciled. Donald Childress, in the context of international law, has held that ethical considerations are implicitly present in any attempt

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[24] cf Bowman, 'The protection of animals under international law' (n 9) 488.
[25] See John Austin, *The province of jurisprudence determined* (John Murray 1832) 278 (emphases omitted).
[26] See n 11. See also Thomas G Kelch, 'Toward a non-property status for animals' (1997–1998) 6 New York University Environmental Law Journal 531, 555.
[27] See Hart*, The concept of law* (n 11) 185; Kelsen (n 10) 67–8.
[28] See Tom Regan, *The case for animal rights* (Routledge & Kegan Paul 1983) 394. cf Antonio Cassese, '*Ex iniuria ius oritur*: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?' (1999) 10 European Journal of International Law 23, 25.
[29] Eg Richard A Posner, 'The problematics of moral and legal theory' (1997–1998) 111 Harvard Law Review 1637, 1695; Simo S Oja, 'Onko eläimillä oikeuksia? Eläinkoelainsäädännön kehitys ja nykytila' (PhD thesis, University of Helsinki 2011) 82–3.
[30] See Hart, *The concept of law* (n 11) 185, 200, 203–4; Posner (n 29) 1694.
[31] See Farhana Yamin, 'Biodiversity, ethics and international law' (1995) 71 International Affairs 529, 535; Simon Brooman and Debbie Legge, *Law relating to animals* (Cavendish Publishing 1997) 27–8; Susan Finsen, 'Obstacles to legal rights for animals : can we get there from here?' (1997) 3 Animal Law i, iv.

to determine what rule of law should be applied to a particular dispute[32]. Jan Klabbers is interested in the role virtue could play in practical working of international law[33]. For others, ethics is about compliance: why and how states come to decide whether they comply or fail to comply with their international obligations[34]. My approach, by comparison, is relatively simple: as stated above, I merely seek to read international legal instruments pertaining to animals together with animal ethics to discover whether any meaningful connections exist between the two.

That said, describing an academic work as 'positivist' does not, I believe, satisfactorily describe just how a researcher intends to arrive at whatever truth she is seeking. It *does* go some way towards explaining where exactly the researcher intends to find the law, of course. In this regard, I understand the sources of international law as those formal sources listed in article 38(1) of the Statute of the International Court of Justice ('ICJ statute'), that is:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[35]

A firm rooting in formal sources of law is necessary for any work of legal science[36]. *These* are the materials that, insofar as they pertain to animals, constitute the international animal law I seek to understand. Still, a commitment to a particular doctrine of sources does not describe the practical approaches and techniques used in a scientific work in any greater detail than designating a work as 'positivist'. It follows that something further must be said about the method(s) used in this work.

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[32] See Childress (n 12) 2.
[33] See Jan Klabbers, *International law* (CUP 2013) 312–3.
[34] See generally eg Roger P Alford and James Fallows Tierney, 'Moral reasoning in international law' in Donald Earl Childress III (ed), *The role of ethics in international law* (CUP 2012); Oona A Hathaway, 'Between power and principle' in Donald Earl Childress III (ed), *The role of ethics in international law* (CUP 2012).
[35] (adopted 26 June 1945, entered into force 24 October 1945).
[36] See Aulis Aarnio, *Laintulkinnan teoria* (Werner Söderström 1989) 195.

According to Ari Hirvonen, there is no one single accepted method in legal science[37]. Any choice of a method is sensitive to the task at hand: a change in the problem being researched may necessitate a change of method[38]. Furthermore, no method available to the scientist is automatic in a sense that one would merely need to input the relevant data and then wait for the method to extract the correct results as if the science would be some kind of a mechanic procedure[39]. I have come to accept that the best way to go about describing one's method is simply to describe what steps one intends to take and which tools to use as simply and as transparently as possible—attempt this I now shall. Since my research tasks differ greatly from one chapter to another, it will be practical to explain my approach one chapter at a time.

In chapter II, I examine moral philosophy as it pertains to the status and treatment of animals. As said above, the intention has not been to contribute to existing literature on the point, so I have been content with arriving to an understanding of various theoretical positions and being able to express them concisely and in a manner consistent with the purpose of this thesis. Chapter II, therefore, draws predominantly from literature on animal ethics and focuses on a number of select theories that best represent the respective branches of thought they belong to. The choice of materials and other relevant details will be discussed further at the beginning of the chapter, but at this stage it will suffice to say that we shall move from theories holding animals as morally irrelevant to theories not only positing that animals matter morally but that animals and humans are moral equals; from one extreme to another, as it were.

Chapter III focuses on the *legal* implications of animal use. The purpose of this chapter is to deepen the understanding of the *moral* implications of animal use acquired in chapter II by contrasting the philosophy with the law. The emphasis is largely theoretical: instead of focusing on the interpretation of legal instruments, the focus is on understanding the *theory* that animates the law. As such, chapter III will draw largely from literature on animal law and supplement scientific sources with examples of legal instruments insofar as is necessary. As the purpose of this thesis is not to contribute to existing debate on animal law either, chapter III simply constitutes the latter half of the development of a theoretical framework which will

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[37] See Ari Hirvonen, *Mitkä metodit? Opas oikeustieteen metodologiaan* 7 <http://www.helsinki.fi/oikeustiede/tutkimus_ja_julkaisut/julkaisut/yleinen_oikeustiede/hirvonen_mitka_metodit.pdf> accessed 14 August 2014.

[38] cf Tapio Lappi-Seppälä, 'Rikosoikeustutkimus, kriminaalipoliittinen orientaatio—ja metodi' in Juha Häyhä (ed), *Minun metodini* (Werner Söderström Lakitieto 1997) 189.

[39] See Aulis Aarnio, 'Oikeussäännösten systematisointi ja tulkinta' in Juha Häyhä (ed), *Minun metodini* (Werner Söderström Lakitieto 1997) 35.

permit the 'ethical' reading of international animal law in chapter IV. To summarize, we shall begin from the theory of animal welfare, contrast it with its polar opposite, animal rights theory, and also discuss a number of intermediary positions for the sake of completeness.

In contrast to chapters II and III, the main emphasis of chapter IV is with analyzing legal instruments. In this regard, the central method of chapter IV is legal dogmatics: the purpose is to analyze the content of legal norms in force[40]. However, the purpose, as has been stated, is not *only* to interpret the law from a perspective internal to the law, but to look beyond the strictly legal implications of norms into what their *moral* implications are. In this sense, my method is something different, something more than legal dogmatics. Perhaps my approach lies somewhere between legal dogmatics and 'law and ethics', since the examination of the moral implications of the law is necessarily connected, at least on some level, to a question of whether the norms examined are just[41].

Above, I stated my commitment to article 38 of the ICJ statute as an expression of the formal sources from which the rules of international law (exhaustively[42]) flow. A few additional remarks are now in order. The sheer amount of international legal materials pertaining to animals make it, as will be reiterated in chapter IV, impossible to attempt to account for any and all legal norms within present constraints. International animal law should, of course, be so construed as to contain all legal instruments and rules having anything to do with animals. The amount of relevant treaties alone, however, is remarkable. As we move from treaties to other formal sources of international law—namely customary law and general principles of law—, certain problems arise. Customary law, as is well-established, consists of two elements: general, uniform, and consistent state practice, and the psychological element of *opinio juris sive necessitatis*, that is, the fact that states engage in practice because they believe they are legally obligated to do so rather than acting out of mere habit[43]. Proving the existence of a customary rule of international law requires remarkable empirical proof of both practice and the attitude of states animating said practice. Given these difficulties (and the abundance of available

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[40] cf Hirvonen (n 37) 22.
[41] cf ibid 29.
[42] cf Hugh Thirlway, 'The sources of international law' in Malcolm D Evans (ed), *International law* (3rd edn, OUP 2010) 98–9.
[43] See *North Sea continental shelf (Germany v Denmark, Germany v Netherlands)* [1969] ICJ Rep 3, para 77; *Continental shelf (Libya v Malta)* [1985] ICJ Rep 13, para 27; *Military and paramilitary activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, para 207; Thirlway (n 42) 102.

treaties), I have elected to leave customary rules outside my scope of inquiry; to prove the existence of one customary obligation alone would be a challenge for any Master's thesis.

Turning to 'general principles of law recognized by civilized nations', there are various theories as to what these principles are, but most scholars would agree that such principles can be located by means of comparative law in the domestic legal systems of sovereign states. The general idea is that the International Court of Justice ('ICJ') may, when facing a situation of *non liquet*, apply principles found in domestic systems by way of analogy.[44] It is obvious that evidencing such principles is just as—if not more—empirically challenging as proving the existence of wide-spread state practice and *opinio juris*. Moreover, the task of evidencing a general principle of law by studying domestic legal systems brings the researcher close to shifting from the academic discipline of public international law to that of private international law and comparative law. Again, as there is an abundance of treaty regimes as it is, I have elected to leave general principles of law outside the scope of my work. In studying international animal law, I thus focus on treaties. Which treaties exactly I have chosen for scrutiny will be explained in the beginning of chapter IV.

Thomas Wilhelmsson has argued that any researcher taking her work seriously must always seek clarity in regard to what she is doing and constantly ask herself how she perceives the law[45]. In this section, I have tried, to the best of my ability, to live up to Wilhelmsson's criteria. I have expressed my commitment to legal positivism and article 38 of the ICJ statute as an authoritative list of the sources of international law. I have attempted to be as clear and as transparent as possible about my approach, describing how I seek to combine the study of moral philosophy and a (mostly) theoretical study of animal law with a dogmatic (but also ethical) analysis of international (treaty) law as it pertains to animals. Seeing as how I have not committed myself to using any single method to the exclusion of all others, but rather combine several approaches, my method could, perhaps, best be described as eclectic.

Terms and concepts

As this thesis will make use of a number of terms and concepts that do not belong to the everyday parlance of public international law, it is best a few words of clarification are said

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[44] See Thirlway (n 42) 108–9; Klabbers, *International law* (n 33) 25, 34.
[45] Thomas Wilhelmsson, 'Sosiaalisen siviilioikeuden metodiset lähtökohdat' in Juha Häyhä (ed), *Minun metodini* (Werner Söderström Lakitieto 1997) 355.

prior to moving on to chapter II. The first remark connects to the very objects of the present study: 'animals'. What exactly is included in this category of beings? Taxonomically, humans are as just as much 'animal' as, say, geese. Both belong to the same kingdom and phylum, Animalia and Chordata respectively. Humans, however, belong to the class Mammalia, whereas geese belong to the class Aves. Despite minor differences in terms of taxa, humans, then, *are* animals, but when we refer to 'animals', we generally refer to every species of animals *except* humans[46]. Some authors attempt to soften this great divide by speaking of 'nonhuman animals'. The logic is, apparently, that humans are 'human animals' whereas all other animals are 'nonhuman animals'. There is some appeal to this approach, but as Katie Sykes has pointed out, it runs the risk of making 'the argument less persuasive to all but the already converted'.[47] Lisa Kemmerer attempts to remedy this linguistic problem by coining the term 'anymal', 'anymal' being the equivalent of 'nonhuman animal' for all practical purposes[48]. That said, for the remainder of this thesis I will prefer 'animal' for the sake of brevity and simplicity, aware as I am that some might consider such an assignment of all of nonhuman life under a single unifying category amounting to an 'asinanity', a denial of one's own animality and a direct contribution to the 'war of the species'[49]. Yet I have no such designs; those bothered by my choice of words may freely substitute 'animal' with 'nonhuman animal' or 'anymal' each time they encounter the word in this work. Besides, I believe the ethical and legal perspectives examined in chapters II and III will speak for themselves loud and clear enough to dissipate such worries.

What, then, is 'animal law'? Joan Schaffner defines the term as 'legal doctrine in which the legal, social or biological nature of nonhuman animals is an important factor.'[50] Jordan Curnutt's take is more simple: 'animal law' is the 'set of legal rules governing human practices that involve animals'[51]. Not surprisingly (seeing as animal law is not taught at any Finnish universities), the verbatim translation of 'animal law' into Finnish—*eläinoikeus*—has not received any determinate meaning thus far; besides, due to the intricacies of Finnish language, the term is easily confusable with *eläinten oikeudet*—'animal rights'. At any rate, when I refer to 'animal law', I refer to the (domestic and predominantly Western) body of legal rules and

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[46] Schaffner, *An introduction to animals and the law* (n 7) 6.
[47] Sykes, 'The beasts in the jungle: animal welfare in international law' (n 17) 1.
[48] See Lisa Kemmerer, *In search of consistency: ethics and animals* (Brill 2006) 10.
[49] See Jacques Derrida, *The animal that therefore I am* (Marie-Louise Mallet ed, David Wills tr, Fordham University Press 2008) 31.
[50] Schaffner, *An introduction to animals and the law* (n 7) 4–5.
[51] Jordan Curnutt, *Animals and the law : a sourcebook* (ABC-CLIO 2001) 2.

doctrine pertaining to the status and use of animals. While I would be ready to adopt a very broad reading of the term, encompassing practically any legal rules that have anything whatsoever to do with animals, the term, as will be seen in chapter III, is mostly used in the context of anticruelty and welfare statutes and a small number of core doctrines, namely the one according to which animals are viewed as property. As regards 'international animal law', I adopt a similarly broad definition: notwithstanding the scope of this thesis being limited to a number of treaties, I understand 'international animal law' as meaning any international legal regulation pertaining to animals.

Turning to ethics, insofar as I occasionally refer to 'animal ethics', I simply mean any moral theories that contribute to the debate concerning the moral status and acceptable treatment of animals. I do not, as Christopher Stone perhaps would, exclude from 'animal ethics proper' those theories that place animals firmly under human dominance and permit practically any kind of treatment, no matter how cruel[52]. Surely there is room for all relevant theories under the umbrella term regardless of how naïve, animistic, or immoral the contesting extremes might consider each other?

Finally, chapter III in particular will make use of concepts such as 'humane treatment' and 'unnecessary suffering'. I could, perhaps, make a point by always placing these words in quotation marks so as to underline their indeterminacy and the fact that, as we will see in chapter III, they do not, as legal concepts, correspond to what the same words mean in colloquial language. For the remainder of this work, no special formatting will be used in attempt to make these concepts stand out; for the time being, suffice it to say that Gary Francione is correct in noting that the concept of 'humane treatment', for example, is 'just another concept whose meaning has been twisted out of recognition' by the contemporarily prevalent theory of animal welfare[53].

[52] cf Stone (n 22) 294.
[53] See Gary L Francione, *Animals, property, and the law* (Temple University Press 1995) 30.

II ANIMALS AND ETHICS

> And God blessed Noah and his sons, and said unto them, Be fruitful, and multiply, and replenish the earth. And the fear of you and the dread of you shall be upon every beast of the earth, and upon every fowl of the air, upon all that moveth upon the earth, and upon all the fishes of the sea; into your hand are they delivered. Every moving thing that liveth shall be meat for you; even as the green herb have I given you all things.[54]

The exploitation of animals, no matter how strongly it pervades contemporary societies, gives rise to many moral considerations. How should we feel about the fact that male chicks of the egg-laying strain are treated as a form of industrial waste and disposed of accordingly[55]? Is it right or wrong to hold Asian black bears in so-called crush cages and carve permanent fistulae in their abdomen to extract their bile[56]? No easy answers present themselves here; concerns surrounding animal exploitation connect to some of the most fundamental questions of morality, which, in part, explains the considerable breadth of literature on animal ethics and

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[54] Genesis 9:1–3 (KJV).

[55] See RSPCA, 'What happens with male chicks in the egg industry?' (*RSPCA Australia knowledgebase*, 24 March 2014) <http://kb.rspca.org.au/What-happens-with-male-chicks-in-the-egg-industry_100.html> accessed 11 July 2014; AVMA, *AVMA guidelines for the euthanasia of animals: 2013 edition* (AVMA 2013) 62–3 <https://www.avma.org/kb/policies/documents/euthanasia.pdf> accessed 11 July 2014.

[56] See generally IK Loeffler, J Robinson, and G Cochrane, 'Compromised health and welfare of bears farmed for bile in China' (2009) 18 Animal Welfare 225; Yibin Feng and others, 'Bear bile: dilemma of traditional medicinal use and animal protection' (2009) 5 Journal of Ethnobiology and Ethnomedicine <http://www.ethnobiomed.com/content/5/1/2> accessed 14 July 2014; Fiona MacGregor, 'Inside a bear bile farm in Laos' (*The Telegraph*, 19 August 2010) <http://www.telegraph.co.uk/news/worldnews/asia/laos/7950161/Inside-a-bear-bile-farm-in-Laos.html> accessed 11 July 2014.

the fact that over the course of millennia, writers have taken radically different positions in regard to the status and treatment of animals. What follows here is the first step in developing a framework for understanding the moral implications of international animal law. By examining moral theories from one extreme to the other, we will see just how differently the relationship between humans and animals and the nature of human duties (or lack thereof) towards animals can be approached in terms of moral philosophy.

As is often the case with understanding, animal ethics, too, becomes more comprehensible if we can conceive of some way to systematize theories, to arrange them in groups based on some common denominators. In moral philosophy, it is common to distinguish, for example, deontological theories from consequentialist theories: deontological theories assess the rightness and wrongness of conduct based on its adherence to moral duties or obligations whereas consequentialist theories determine rightness and wrongness solely on the basis of consequences[57]. This is a useful distinction in some contexts, but not here. The theories of Immanuel Kant and Tom Regan, for example, are both deontological, yet to label them as such and then move on as if that would have satisfactorily described their thought would be to grossly misrepresent what is a profound difference between their respective positions.

My task in chapter IV is to examine the moral implications of international animal law, so this chapter should offer something of value for that purpose. As my analysis in chapter IV will serve to reiterate, there are two questions, I argue, all legal instruments pertaining to animals ultimately ask: 1) *how do I perceive animals?*; 2) *how should animals be treated?* All instruments, from fisheries agreements to multilateral conventions governing the conservation of endangered species to regional treaties prohibiting leg-hold traps, answer these questions either explicitly or implicitly. I cannot imagine a legal instrument that would be vague to a point where it could not give meaningful answers to these two questions. Any treaty, no matter how open for interpretation its language might be, will at the very least give *some* account of *what an animal is*—a natural resource, a representative of a species, an individual—and *how it is to be treated*—must be conserved yet at the same time utilized to an optimal degree; commercial hunting prohibited, taking for scientific purposes permitted; particular slaughtering methods proscribed, otherwise free to be exploited; and so on. These observations in mind, I have

[57] See James Fieser, 'Ethics' (*Internet Encyclopedia of Philosophy*) <http://www.iep.utm.edu/ethics/> accessed 3 August 2014.

sought to address each theory examined in this chapter by asking these same questions: *what is the moral status of animals under this theory, how must we treat animals?*

So, how to systematize? First of all, extremes are helpful: by contrasting opposite positions with each other, both can be understood with greater clarity. The theories examined here will be placed in three groups, two of them being in stark contrast with each other with an intermediary position lying between the extremes. The purpose here is not to judge which theory one should abide by; it is simply to develop a framework for the later analysis of international animal law. In order to avoid the movement from one extreme to the other implying progression or regression, the final section of this chapter will close the circle, as it were, by presenting critique against theories from all three groups.

The first group examined places animals in a position subordinate to humans and holds that the treatment of animals is not a morally relevant question. The two theories constituting this group will be those of Aristotle and René Descartes. The second group holds, similarly, that animals are inferior to humans and that it is prima facie morally permissible to use animals as means to human ends. However, the theories in this group posit that humans nonetheless have *indirect duties* to animals. The theories examined under this group belong to Thomas Aquinas and Immanuel Kant. The third and final group holds that there are no morally relevant differences between humans and animals and that humans owe duties to animals *directly*. The first theory is the 'preference-utilitarianism' of Peter Singer, the second the 'rights view' of Tom Regan.[58] All of the theories examined under the three headings can meaningfully be approached through the two questions formulated above since they all present a view on the human-animal relationship as well as the manner in which animals ought to be treated.

The following sections are not intended to be a comprehensive study of animal ethics: the entirety (assuming it is even possible to locate all literature on the topic) of contesting theories could not be assessed satisfactorily within present constraints, nor is it my intention to attempt such a feat. Instead, each section will showcase two theories that, I believe, best exemplify the

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[58] For our present purposes, I will borrow Regan's distinction between 'indirect duty views' and 'direct duty views' without implying that the theories examined here are predicated on a concept of *duty*. I therefore use the term merely as a shorthand when assessing whether a particular theory holds animals to be morally relevant in and of themselves or for someone (or something) else's sake. See Regan (n 28) 150–1. I owe the division of theories into three groups initially to Scott Wilson, however I disagree that we can consider the positions of Aristotle and Descartes as postulating indirect duties. I therefore place the two aforementioned into the first group explained above. See Scott D Wilson, 'Animals and ethics' (*Internet Encyclopedia of Philosophy*) <http://www.iep.utm.edu/anim-eth/> accessed 17 August 2014.

characteristics of the group under consideration. As will be seen below, the end result may very well be the same, but the approaches employed by the chosen theories vary greatly.

As a final note, the focus here is predominantly Western: the ancient philosophy is Greek, the theology Christian, all the theories examined authored by white, (mostly) dead men. None of this is to say that there would be no literature on non-Western, non-Christian, perhaps even feminist animal ethics—quite the contrary. Yet this Western bias has, I fear, been unavoidable to a large extent. When Andrew Rowan states that 'philosophers have written more on the general topic of animal rights during the past ten years than their predecessors wrote during the preceding two thousand'[59], it is Western philosophers and their European predecessors he has in mind. The most influential figures spearheading the so-called 'animal liberation movement'—Peter Singer and Tom Regan, for example—are Western authors (an Australian and an American, respectively). They, in turn, have been inspired by their European forefathers.[60] The considerable breadth of Western philosophy on the point is reflected in the abundance of sources available for the researcher; relatively few works, by comparison, explore alternative approaches[61]. Edited volumes on animal ethics betray a similarly Western bias[62].

Ultimately my perpetuation of the cycle happens for two reasons. Firstly, the theories of animal welfare and animal rights examined in chapter III are the direct product of moral theories developed in Western thought. Consequently, I believed it best to focus on those theories that are most relevant in this regard. That said, secondly, while either similar or even altogether different theories could be found in non-Western, non-Christian literature, what more would a wider cultural or religious basis have offered here? As we shall see shortly, indirect duty views, for example, can be understood by reference to the works of Thomas Aquinas, Immanuel Kant, and John Rawls, just to name three authors. Would it have made a considerable difference had I included a, say, buddhist perspective? I do not think so.

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[59] Tom Regan and Peter Singer (eds), *Animal rights and human obligations* (2nd edn, Prentice-Hall 1989) vii.
[60] Singer, being a consistent utilitarian, is naturally indebted to Jeremy Bentham and other classical utilitarian philosophers. Regan, when fleshing out his concept of moral rights, borrows directly from another utilitarian, John Stuart Mill. See Regan (n 28) 269–71.
[61] See generally eg Kemmerer (n 48) 283–359; Oja (n 29) 42–4.
[62] See generally Regan and Singer (n 59); Paul AB Clarke and Andrew Linzey (eds), *Political theory and animal rights* (Pluto Press 1990).

A just war

Suppose no duties exist between humans and animals: animals are not morally relevant, their treatment raises no issues that morals should be concerned with. It is helpful, though not necessary, to conceive of some characteristic that distinguishes us from them for this position to work. The philosophy of Aristotle and René Descartes illustrate this point well: one finds the justification for animal exploitation in the natural order of things, the other in their lack of consciousness.

Humans are animals, too, says Aristotle, but the human being is a *political* animal, more so than any other species. Animals may possess a *voice*, allowing them to express what they perceive as painful or pleasant; man, however, is the only animal who nature gifted with *reasoned speech*. Speech permits one to express what is advantageous and harmful, what is just and unjust, and it is a 'peculiarity of humans' to have a perception of good and bad, of just and unjust.[63] Animals, it follows, may share in on an understanding of pain and pleasure, but they cannot understand concepts such as 'right', 'wrong', or 'justice'.

Aristotle, as is well known, was a supporter of slavery. For him, it was nature's design that those who '[share] reason sufficiently to perceive it' but do not have it for themselves be enslaved and ruled over by masters who *do* possess reason. Tame animals, too, were better off being ruled by human masters for their own preservation. 'It is manifest', Aristotle says, 'that by nature some are free and others slaves and that service as a slave is for the latter both beneficial and just.'[64] But just as nature had made some men slaves and other men masters, so too did it make some things exist for the sake of others. To live without food is impossible, Aristotle remarks, but fortunately nature has catered for all diets, both human and animal. It is to be supposed, then, that nature made plants for the sake of animals and animals, in turn, for the sake of humans, for our use, food, clothing, tools, and so on.[65] And thus the use of animals as commodities was justified:

> If nature, therefore, makes nothing either incomplete or in vain, then she has necessarily made all these things for the sake of human being, and hence the art of war will also by nature be a science of property in a way. For the art of hunting is a part of it, and this art has to be used against wild animals and those human

[63] See Peter L Phillips Simpson (tr), *The politics of Aristotle* (University of North Carolina Press 1997) 11.
[64] ibid 16–7.
[65] ibid 21–2.

> beings who, though unwilling to be ruled, are naturally fit for it, as this war is by nature just.[66]

Few today, of course, would share Aristotle's belief about slavery being a natural condition for humans and animals alike—certainly not for humans, at any rate. Descartes provides us with an alternative that *does* allow us to set all humans apart from all animals. The underlying idea is very simple: humans are conscious, animals are not.

For Descartes, use of language evidences thoughts and, thus, consciousness. We could not, he claims, distinguish between an irrational animal and a machine carefully built to imitate one, but we would *always* be able to see the difference between real human beings and machines built to resemble humans. For even if these machines could emit words and cry out when we hurt them, they could not arrange words into sentences and spontaneously express their thoughts, and even if they would exceed our skill in some particular task, they would fail in others, by which we would know that they act not out of consciousness and reason, but out of the mere disposition of their organs.[67]

The same test can be used to distinguish humans from animals. Even the 'dull-witted', the 'stupid', and 'madmen' can express their thoughts by using language; no animal can do the same. Further, attributing mental powers to animals on the fact that they, too, evidence more skill in some tasks than we do would mean that they are more intelligent than us and 'surpass us in everything'; this is clearly not the case, because, just like machines, they only excel in some tasks whilst failing in others. Animals, then, have no reason, no mental powers: it is merely nature that acts in them, like the ropes and springs of a clock.[68]

Where there is no consciousness, *everything* is permitted. Thus, if the body of a dog has no feeling, and its cries are merely the noise of some little spring being touched, there is nothing questionable in administering a beating, even nailing it on a wooden board and cutting it open. As for killing animals for food, Descartes' view is 'not so much cruel to animals as indulgent to men ... since it absolves them from the suspicion of crime when they eat or kill animals.'[69]

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[66] ibid 22.
[67] René Descartes, *A discourse on the method of correctly conducting one's reason and seeking truth in the sciences* (Ian Maclean tr, OUP 2006) 46–7.
[68] ibid 47–8. See Regan (n 28) 3.
[69] See Nicholas Fontaine, *Memories pour servir a l'histoire de Port-Royal* (Cologne 1738) 52–3 as cited in Peter Singer, *Animal liberation* (2nd edn, Thorsons 1991) 201–2; René Descartes, 'Animals are machines' in Regan and Singer (n 59) 19.

Humans and animals, then, are different in a morally relevant way. For Aristotle, nature made them for our sake, much as she made some men slaves and others masters. To use animals as nature intended, to hunt them as one would hunt men refusing to succumb to slavery, is to wage a just war. For Descartes, animals are void of feeling, consciousness, thoughts, reason. If something is more akin to a lifeless machine than to us, vivisecting it does not even begin to raise moral concerns. Morality is concerned with something else: how one is to lead a good life, relishing the virtues of means while steering clear of the vices of excesses and deficiencies[70], or finding happiness in right judgments and knowledge[71]. Neither Aristotle nor Descartes state explicitly whether some guarantees or safeguards should nonetheless exist: it is their silence, in this regard, that speaks the loudest. Animals, it follows, are excluded from moral consideration: their deaths and their suffering (insofar as they are even capable of experiencing it) are no concern of ours.

Duties to mankind

To view that we have no duties whatsoever in regard to animals gives rise to some troubling questions. A Cartesian understanding of animal consciousness, as we have seen, permits not only the consumption of animal flesh but also violence in general, regardless of whether carried out for scientific purposes or for no reason at all, that is, gratuitously. The latter we might today term 'cruelty', a word fitting for the disapproval it conveys. What is one to do if the views of Aristotle and Descartes conform poorly with one's own enlightened intuitions and sensibilities?

This second position assumes that we have indirect duties to animals: that is, not duties *to* them, but duties *involving* them. Thus, animals are a 'medium through which we ... either succeed or fail to discharge' duties to nonanimals: ourselves, humanity, perhaps even God.[72] This is a position we do not find in Aristotle's theory. For him, where there is no justice, there is no friendship either, not between master and slave, nor between man and horse[73].

To hold that humans have indirect duties to animals is not to hold that there are no differences between the former and the latter, nor is it to condemn using animals for food and other purposes. We may even continue to hold on to the idea of rationality as *the*

[70] See Aristotle, *The Nicomachean ethics* (David Ross tr, OUP 2009) 25, 28–36.
[71] See Descartes, *A discourse on the method of correctly conducting one's reason and seeking truth in the sciences* (n 67) 21–5.
[72] See Regan (n 28) 150, 186.
[73] Aristotle (n 70) 156.

distinguishing characteristic and the Aristotelian idea that some beings are made for the sake of others. Thomas Aquinas certainly did so, although he does name several other differences apart from rationality. In *Summa contra gentiles*, Aquinas gives a relatively comprehensive listing of what sets 'intellectual creatures' apart from the rest[74], but his writings in *Summa theologiae* betray a much more Aristotelian influence:

> ... just as in the generation of things we perceive a certain order of procession of the perfect from the imperfect ... so also is there order in the use of natural things; thus the imperfect are for the use of the perfect; as the plants make use of the earth for their nourishment, and animals make use of plants, and man makes use of both plants and animals.[75]

'There is no sin in using a thing for the purpose for which it is', Aquinas writes, and from there flows the lawfulness of killing and using animals[76]. At this stage, we are at a position roughly comparable to that of Aristotle: animals exist for the sake of humans, there is nothing questionable or unjust in using them as commodities. Here, however, Aquinas takes a step away from the unbridled human dominance over lower creation. He is keenly aware that certain passages in scripture forbid us to be cruel to animals. How could this be? Three explanations follow. Firstly, cruelty may be prohibited to 'remove man's thoughts from being cruel to other men ... lest through being cruel to animals one become cruel to human beings'[77]. Secondly, injuring an animal may entail harm to a fellow human being, such as its owner. Finally, scripture itself may offer an explanation in some cases. Thus the prohibition against 'muzzling the ox that tradeth the corn', for example, does not mean that God cares for oxen: '[f]or our sakes, no doubt, this is written'.[78] Cruelty against animals, then, is not wrong in itself[79]. But it may be wrong, on occasion, because of our concern for our fellow human beings.

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[74] See Thomas Aquinas, *Summa contra gentiles* (English Dominican Fathers tr, Burns, Oates, and Washburne 1934) III 112 <http://pm.nlx.com.libproxy.helsinki.fi/xtf/view?docId=aquinas/aquinas.01.xml;chunk.id=idfront01;toc.depth=1;toc.id=idfront01;brand=default> accessed 3 August 2014.

[75] Thomas Aquinas, *Summa theologiae* (English Dominican Fathers tr, Burns, Oates, and Washburne 1912–1936) I Q 96 A 1 <http://pm.nlx.com.libproxy.helsinki.fi/xtf/view?docId=aquinas/aquinas.02.xml;chunk.id=idfront02;toc.depth=1;toc.id=idfront02;brand=default> accessed 3 August 2014. Notice how Aquinas even refers to the 'Philosopher' for additional support.

[76] ibid II-II Q 64 A 1.

[77] cf n 84.

[78] Aquinas, *Summa contra gentiles* (n 74) III 112. See Aquinas, *Summa theologiae* (n 75) II-II Q 64 A 1; Deuteronomy 25:4 (KJV); 1 Corinthians 9:9–10 (KJV) (emphasis omitted).

[79] See Singer, *Animal liberation* (n 69) 194.

Turning to more secular philosophy, Immanuel Kant, too, held rationality to be the requirement for entrance into the moral community. For Kant, having a representation of one's 'I' means one is self-aware and consequently rational. Animals may 'have representations of the world, but not of their I', which means they are neither self-aware nor rational.[80] The faculty of reason, then, is the morally relevant difference here, and its implications cannot be overemphasized. For it is only rational beings, *persons*, who exist as ends in themselves, as 'something that may not be used merely as means'. Beings without reason, *things*, have only relative value as means.[81] So when the 'supreme practical principle' obliges us to '[a]ct so that you use humanity, as much in your own person as in the person of every other, always at the same time as end and never merely as means'[82], nothing is said about our duties to animals—precisely because *there are no duties owed by persons to things*.

But Kant is not blind to the issues raised by cruelty either. Yet his formulation of the categorical imperative, as we have seen, precludes him from conceiving of duties owed directly to animals. What is Kant to do? He finds the solution in our duties to *ourselves*. Treating animals cruelly or otherwise without love is demeaning to ourselves. More than that, it 'contains an analogy of violation of the duty to ourselves' since we would never treat ourselves cruelly. Cruelty, then, is 'an indirect violation of humanity in our own person'.[83] Kant seems to be particularly worried about the effects of animal cruelty on children and strikes a rather Thomist note when he observes that those who treat animals cruelly are likely to also be hardened towards their fellow men[84]. That will not do; we must cultivate our duties to humanity. Thus

> [i]f a dog ... has served his master long and faithfully, that is an analogue of merit; hence I must reward it, and once the dog can serve no longer, must look after him to the end, for I thereby cultivate my duty to humanity ... if a man has his dog shot, because it can no longer earn a living for him, he is by no means in breach of any duty to the dog, since the latter is incapable of judgment, but he thereby damages the kindly and humane qualities in himself, which he ought to exercise in virtue of his duties to mankind.[85]

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[80] See Immanuel Kant, *Lectures on anthropology* (Allen W Wood and Robert B Louden eds, Robert R Clewis and others trs, CUP 2012) 17, 50, 348.
[81] Immanuel Kant, *Groundwork for the metaphysics of morals* (Allen W Wood ed and tr, Yale University Press 2002) 45–6.
[82] ibid 46–7 (emphasis and footnotes omitted).
[83] Immanuel Kant, *Lectures on ethics* (Peter Heath and JB Schneewind eds, Peter Heath tr, CUP 1997) 434–5.
[84] See ibid 212.
[85] ibid 212, see also 177, 213.

In this group of theories, humans and animals continue to be different in morally relevant ways. Aquinas found the difference in many things, the order of nature one among them, Kant mostly in rationality. Still other differences could certainly be claimed. John Rawls, for example, believed that the possession of a 'sense of justice' is what separates those who are owed justice from those who are not. Even so, we could still hold that, as he puts it, '[c]ertainly it is wrong to be cruel to animals.'[86] There is arguably a sense of compassion in these theories that is altogether absent in the views of Aristotle and Descartes. If anything, Aquinas and Kant show us that were one to find a morally relevant difference between humans and animals, it is possible to hold that exploiting animals is not morally wrong *while at the same time* holding that cruelty is.

The anti-humanist thesis

Perhaps it is possible to do better still. Whereas Aquinas and Kant hold that we may be compassionate and kind towards animals out of love for ourselves or even all of humankind, not everyone would agree that animals are a mere 'practising-ground for virtue'[87]. Those who own companion animals, for example, might find it difficult to believe that their care for their pets is ultimately only an exercise in cultivating humane attitudes towards fellow human beings through a nonhuman medium. This final group of theories rejects the belief that duties to animals are indirect and holds that belonging to the species *Homo sapiens* is not morally relevant in and of itself—the 'anti-humanist thesis'[88]. If humans and animals are similar in relevant respects, we either owe it to them to consider their interests on an equal footing with our own interests, or must recognize their moral right to respectful treatment, that is, treatment that recognizes their inherent value.

Jeremy Bentham was among the first philosophers to question the great divide that had traditionally set humans apart from the rest of the animal kingdom and also justified their different treatment. In an oft-quoted footnote that tends to find its way into most writings on animal ethics (this thesis included), Bentham observed that

> [t]he day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason

[86] See John Rawls, 'The sense of justice' (1963) 72 Philosophical Review 281, 281–4, 300–4; John Rawls, *A theory of justice* (OUP 1973) 512.
[87] See David Ross, *The right and the good* (OUP 1950) 49.
[88] See Andrew Gleeson, 'Eating meat and reading Diamond' (2008) 37 Philosophical Papers 157.

> why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, that the number of the legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or, perhaps, the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even a month, old. But suppose the case were otherwise, what would it avail? the question is not, Can they *reason?* nor, Can they *talk?* but, Can they *suffer?*[89]

Bentham and the utilitarians have received much praise for their then-radical inclusion of animals within the community of holders of relevant interests. The contemporarily prevalent legal theory of animal welfare—discussed in detail in chapter III—is arguably the direct descendant of utilitarianism.[90] One contemporarily influential philosopher whose views are rather obviously indebted to Bentham's theory is Peter Singer, author of *Animal liberation*. It is, perhaps, no surprise that the 'animal liberation movement' carries the name of Singer's seminal book on animal equality.

Equality, for Singer, is not restricted by boundaries of species membership. The opposite view he would label 'speciesism'. Speciesism, akin to other forms of prejudice such as racism or male chauvinism, is a 'prejudice or attitude of bias in favor of the interests of members of one's own species and against those of members of other species.'[91] If a being—any being—is capable of suffering, there can be no justification for turning a blind eye to that being's suffering regardless of what species that being happens to be. Since suffering is the trigger for duties, sentience—the capacity to experience suffering and enjoyment—is the *only* defensible criterion for equal consideration.[92] Singer is convinced animals can feel pain. Their nervous systems are virtually identical with ours, so it would be unparsimonious to assume that like behavior stems from some altogether different cause.[93]

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[89] Jeremy Bentham, *An introduction to the principles of morals and legislation* (Clarendon Press 1907) 311 (emphases in the original, footnotes omitted). Note, however, how earlier in the same footnote (not cited here) Bentham makes it fairly clear that killing animals for food is morally acceptable. As such, his position seems to be more critical of 'cruelty' than the general use of animals as commodities.

[90] See, inter alia, Regan (n 28) 202; David Favre and Vivien Tsang, 'The development of anti-cruelty laws during the 1800's' (1993) Detroit College of Law Review 1, 3; Brooman and Legge (n 31) 40; Radford (n 7) 25; Martha C Nussbaum, *Frontiers of justice : disability, nationality, species membership* (Belknap Press of Harvard University Press 2006) 338; Thomas G Kelch, 'A short history of (mostly) Western animal law: part II' (2012–2013) 19 Animal Law 347, 354; Jean-Marc Neumann, 'The universal declaration of animal rights or the creation of a new equilibrium between species' (2012–2013) 19 Animal Law 91, 93.

[91] Singer, *Animal liberation* (n 69) 6. See also Regan (n 28) 155; Kemmerer (n 48) 38.

[92] Singer, *Animal liberation* (n 69) 8–9, see 4–5.

[93] ibid 11–2, 15.

So, how are animals to be treated under Singer's theory? Simple: taking animal suffering into account on an equal basis *is in itself* the content of our (direct) moral duty. '[T]he principle of equality requires that [a sentient being's] suffering be counted equally with the like suffering ... of any other being.'[94] Singer's position is a 'form of utilitarianism'[95]. Whereas classical utilitarianism (a consequentialist theory[96]) emphasizes pleasure and pain as the only relevant consequences to take into account, for Singer, the morally right course of action is that which best furthers the *interests* of everyone affected.[97]

As a practical matter, Singer advises his readers to adopt vegetarianism[98], but anyone familiar with the general characteristics of utilitarianism will soon realize that a utilitarian theory on the treatment of animals can hardly hope to lay down any absolute prohibitions: after all, it is the consequences that ultimately decide what is right or wrong in a particular scenario. Singer cannot oppose any particular form of animal exploitation in absolute terms because chances are consequential considerations will justify, in theory, even factory farming. These—and other—shortcomings of utilitarianism have lead Tom Regan to search for interspecial justice in deontological ethics. Singer rejects the language of rights as finding no place in his theory[99]—Regan, on the other hand, argues precisely *for* animal rights.

Like Singer, Regan, too, believes that there are no morally relevant differences between humans and animals. At this stage, it is important to notice that Regan's case for animal rights concerns first and foremost mammalian animals over one year old[100]. Such animals have a *welfare*: they 'fare well or ill during the course of their life, and the life of [some of them] is experientially better than the life of others'[101]. Since they have a welfare, they can be *harmed*. Not all harms hurt, however: some take the form of deprivations. Death, even a painless one,

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[94] ibid 8.
[95] Utilitarianism, in very broad terms, holds that one has a moral duty to carry out the act that results in the greatest amount of happiness / preference satisfaction to the greatest amount of individuals involved. This overly simplified formulation does not accurately capture the intricacies of all of utilitarian theory, which comes in various shapes and sizes, but it will suffice for present purposes. cf Walter Sinnott-Armstrong, 'Consequentialism' (*Stanford Encyclopedia of Philosophy*) <http://plato.stanford.edu/entries/consequentialism/> accessed 17 August 2014.
[96] See n 57.
[97] Peter Singer, *Practical ethics* (2nd edn, CUP 1993) 12–4. See Peter Singer, 'The fable of the fox and the unliberated animals' (1978) 88 Ethics 119, 122; Peter Singer, 'Utilitarianism and vegetarianism' (1980) 9 Philosophy and Public Affairs 325, 328–9; Regan (n 28) 206, 217.
[98] See Singer, *Animal liberation* (n 69) 159–64.
[99] See ibid 8.
[100] See Regan (n 28) 76–8.
[101] ibid 82.

is the ultimate deprivation: it is irreversible because 'once dead, always dead', and it is fundamental because it 'forecloses *all* possibilities of finding satisfaction'.[102]

Rejecting indirect duty theories as morally arbitrary, Regan formulates the 'harm principle': 'we have a direct prima facie duty not to harm individuals', animals included[103]. He then postulates that some individuals have *inherent value*, that is, a value they have in and of themselves, which is 'distinct from, not reducible to, and incommensurate with' the *intrinsic value* of the experiences, pleasures, and preference satisfaction that may attach to them. The criterion for possessing inherent value is that a being is a *subject-of-a-life*. To be considered subjects-of-a-life, beings must have

> beliefs and desires; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate action in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their experiential life fares well or ill for them, logically independently of their utility for others and logically independently of their being the object of anyone else's interests.[104]

All individuals who have inherent value have it equally and are due treatment that respects their inherent value—we cannot treat them 'as if they lacked inherent value', 'as if they were mere receptacles of valuable experiences', or 'as if their value depended on their utility [to others]'. Endorsing John Stuart Mill's conception of moral rights, Regan concludes that all subjects-of-a-life, whether human or animal, have a moral right to respectful treatment.[105] What follows, by comparison to Singer's theory, is an uncompromising stance: for the rights view, vegetarianism is a moral obligation, and nothing short of the 'total dissolution of commercial animal agriculture as we know it' will do. There is no room for consequential considerations in Regan's deontological ethics: '[t]he totem of utilitarian theory (summing the consequences for all those affected by the outcome) is the taboo of the rights view.'[106]

And so we have arrived from one extreme to the other. In this group, which represents both the consequentialist and deontological currents of moral philosophy, there are no morally

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[102] ibid 96–7, 100 (emphasis in the original).
[103] See ibid 187 (emphases omitted), 192–3.
[104] See ibid 235–6, 241–3.
[105] ibid 236–7, 248–9 (emphases omitted), 269, 277–80. See John Stuart Mill, *Utilitarianism* (Parker, Son, and Bourn 1863) 78.
[106] Regan (n 28) 337, 348, 351. See Gary L Francione, *Rain without thunder : the ideology of the animal rights movement* (Temple University Press 1996) 18.

relevant differences between humans and animals. Whether it be because of their sentience of their being 'subjects-of-a-life', the moral status of (some) animals is equal to that of humans. For Singer, this means that their interests must be given equal consideration which, prima facie, proscribes the consumption of animal flesh. For Regan, the recognition of animal rights calls for the abolition of all institutionalized exploitation of animals.

Nonsense upon stilts

One of the mission statements of this chapter was that we shall not pass judgment on the theories examined, that is, argue that some theories are 'good' according to some assumed standards whereas some others are 'bad'. To abstain from endorsing a particular theory at the expense of all others does not, however, mean that one could not be critical about animal ethics. As I have already hinted at some of the issues utilitarian theories run into when trying to formulate a sound theory for the treatment of animals, it is only fair we express here some critique against *all* of the theories showcased in the above sections. Then end result, I believe, is that regardless of their presumptions and conclusions, for our present purposes the showcased views have merely represented *different* ways of conceiving of the relationship between humans and animals and the nature of duties existing between the two; they have not represented *good* or *bad* moral viewpoints. Since the purpose of this chapter is to contribute towards the development of a framework that permits an analysis of international animal law, the exposition of theories here has been, if anything, illustrative.

The theories of Aristotle, Descartes, and Aquinas have been criticized enough in literature on animal ethics, so I will be brief. Suffice it to say that evolutionary theory casts serious doubt on any idea of animals existing solely for the sake of humans[107], and that those of us who do not believe in God or any other deities will not accept appeals to spiritual authorities at any rate. As for Descartes, most today would simply consider his claim empirically inaccurate: there is good reason to believe that animals *do* feel pain when nailed on a board[108].

Kant is in many ways just as arbitrary as Descartes—for different reasons, of course. The so-called argument from marginal cases[109] illustrates this point well. Since Kant holds that rationality is what places humans into the class of persons and animals into the class of things,

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[107] See Radford (n 7) 92.
[108] cf Charles Darwin, *The descent of man and selection in relation to sex*, vol 1 (D Appleton and Company 1871) 38.
[109] See Wilson (n 58).

he basically claims that *all* humans are rational whereas *no* animals are. However, no matter how we interpret the concept of rationality, it is fairly clear that some human beings will not make the cut: infants, the senile, the severely disabled, and so on. To make things more complicated, not all marginal cases are alike: some of them have the potential to become rational (infants), some of them used to be rational but will never be again (the senile), and some (such as people born in a vegetative state) never were and never will be.[110] It is simply impossible to construe rationality so as to include all human beings regardless of their mental state. Kant would therefore either need to concede that his division of beings into persons and things is completely arbitrary (and arguably speciesist) or lower the bar in hopes of finding some other faculty capable of encompassing all of humankind—which would probably lead him closer to the positions of Singer (sentience) or Regan (subject-of-a-life) than his initial one.

Some concerns relating to utilitarian theory have already been aired in the above section. Most philosophers are concerned about the fact that utilitarianism, taken to its extreme, may condone just about any form of discrimination as long as it is justified by the consequences—equality as a matter of principle may transform into gross inequality as a matter of fact. We may not be racists, but it can certainly be imagined that in a particular situation the best overall balance of interests is reached by giving preferential treatment to the strong at the expense of the weak.[111] As Robert Nozick pointed out,

> '[u]tilitarian theory is embarrassed by the possibility of utility monsters who get enormously greater gains in utility from any sacrifice of others than these others lose. For, unacceptably, the theory seems to require that we all be sacrificed in the monster's maw, in order to increase total utility.'[112]

Even Regan's theory, prima facie the most favorable to animals, is not beyond critique, particularly because of its reliance on the idea of moral rights. As Bentham, a famous opponent of moral rights, argued, there are only *legal* rights—'no rights contrary to the law[,] no rights anterior to the law'. For him, moral rights were 'simple nonsense ... rhetorical nonsense,—nonsense upon stilts.'[113] Moreover, some scholars refuse to accept the idea of

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[110] See ibid.
[111] See Regan (n 28) 210, 227–8, cf 350. cf Francione, *Animals, property, and the law* (n 53) 255.
[112] Robert Nozick, *Anarchy, state, and utopia* (Blackwell Publishing 1974) 41.
[113] Jeremy Bentham, 'Pannomial fragments' in Jeremy Bentham, *The works of Jeremy Bentham*, vol 3 (John Bowring ed, William Tait 1843) 221; Jeremy Bentham, 'Anarchical fallacies; being an examination of the declarations of rights issued during the French revolution' in Jeremy Bentham, *The works of Jeremy Bentham*, vol 2 (John Bowring

animals' rights as a matter of principle[114]. Ruth Cigman's theory takes a different approach as it denies that the death of an animal can be considered a harm (or a 'misfortune') because in order to be harmed by death, one must have categorical desires, that is, desires that do 'not merely presuppose *being* alive ... but rather [answer] the question whether one wants to *remain* alive.' Animals cannot have categorical desires for the simple reason that they do not understand life and death as we do.[115] Finally, let us remember that Regan's rights view prima facie excludes all non-mammalian animals as well as mammals below one year of age[116]. In this sense, Regan could be critiqued not on grounds of going too far but on grounds of not going far *enough*. Perhaps the only feasible solution to this last concern is to revere *all* life and help *everything* living, as Albert Schweitzer would have us do[117]—a position not without problems of its own.

To conclude this chapter, we have now seen that the moral status of animals can, depending on the theory, range from nonexistent to inferior to equal in all respects. At one extreme, all forms of animal exploitation were morally permissible—at the other, all institutionalized exploitation has to go. No position examined here is beyond critique, and none of them command universal support. These things said, we have now developed the first part of the framework that will be used in interpreting international animal law in chapter IV—we understand, in broad terms, the moral implications of the relationship between humans and animals and the manner in which animals ought to be treated.

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ed, William Tait 1843) 500–1. For a similar point on the rhetoric of moral rights, see David G Ritchie, *Natural rights : a criticism of some political and ethical conceptions* (Swan Sonnenschein & Co 1903) 108.

[114] See Aulis Aarnio, 'Mitä seuraavaksi?' (1998) Lakimies 983, 987; Oja (n 29) 95, 97.

[115] See Ruth Cigman, 'Death, misfortune and species inequality' (1981) 10 Philosophy and Public Affairs 47, 57–9 (emphases added).

[116] See n 100. Regan does, however, advocate that we give mammalian infants the 'benefit of the doubt', see Regan (n 28) 391.

[117] See Albert Schweitzer, 'Duties to life' in Clarke and Linzey (n 62) 153.

III ANIMALS AND THE LAW

> Whereas it is expedient to prevent the cruel and improper Treatment of Horses, Mares, Geldings, Mules, Asses, Cows, Heifers, Steers, Oxen, Sheep, and other Cattle ... if any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any Horse, Mare, Gelding, Mule, Ass, Ox, Cow, Heifer, Steer, Sheep, or other Cattle ... he, she, or they so convicted shall forfeit and pay any Sum not exceeding Five Pounds, not less than Ten Shillings, to His Majesty, His Heirs and Successors ...[118]

There is nothing particularly novel about human law sometimes involving animal objects. Animals were involved in murder trials in ancient Greece[119] and tried before secular and ecclesiastical courts in medieval and early modern Europe[120]. From moles in Italy to a dog in Switzerland, EP Evans' work on the topic suggests that at least 191 such trials occurred between 824 and 1906[121]. In modern times, animal trials of a kind still exist, but they take a

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[118] Cruel Treatment of Cattle Act 1822 (3 Geo 4 c 71).

[119] See Walter Woodburn Hyde, 'Prosecution and punishment of animals and lifeless things in the middle ages and modern times' (1915–1916) 64 University of Pennsylvania Law Review 696, 698; Walter Woodburn Hyde, 'Homicide courts of ancient Athens' (1917–1918) 66 University of Pennsylvania Law Review 319, 342–3.

[120] See generally EP Evans, *The criminal prosecution and capital punishment of animals* (William Heinemann 1906). Many writers have attempted to make sense of this peculiar practice since, see eg Edward Westermarck, *The origin and development of the moral ideas*, vol 1 (2nd edn, Macmillan and co 1912) 255–7; Hyde, 'Prosecution and punishment of animals and lifeless things in the middle ages and modern times' (n 119), 703–24; Ewald (n 13), 1905–43; Katie Sykes, 'Human drama, animal trials: what the medieval animal trials can teach us about justice for animals' (2010–2011) 17 Animal Law 273, 280–96; Thomas G Kelch, 'A short history of (mostly) Western animal law: part I' (2012–2013) 19 Animal Law 23, 49–54.

[121] See Evans (n 120) 313–34. Some scholars have, however, expressed doubts as to whether these trials every truly took place. Heikki Pihlajamäki observes that none of his colleagues researching European legal history have stumbled upon this alleged practice in their work. Moreover, modern writers' considerable reliance on Evans'

radically different appearance compared to the excommunication of rats or the burning of an egg-laying rooster on a stake. Rather, they are trials in which, for example, human owners of aggressive dogs are given the opportunity to be heard prior to a legal decision that will affect their property[122].

Perhaps it would be anachronistic to claim that modern animal law has its roots in the murder trials held at the Prytaneum of ancient Athens. After all, we have reason to believe that there was little legal about that practice, that it was mostly a ritualistic cleansing of the community following a death caused by an inanimate object or an animal[123]. It is difficult to see how such quasi-legal proceedings could reasonably be seen as some kind of a 'precursor' to our contemporary understanding of animal law, which typically takes the form of anticruelty and welfare laws. The legal paradigm of animals as things that can be owned one *could* perhaps trace back to biblical times—passages from the Bible and the views of Aristotle and Aquinas certainly betray corresponding attitudes—, and some scholars indeed believe that the so-called 'great chain of being' (*scala naturae*) is much to blame for the continuing plight of animals[124]. Be that as it may, it is commonly held, as was noted in chapter II, that the contemporary theory of animal welfare, introduced in modern legal systems by way of anticruelty statutes in the 19th century, owes much to utilitarian philosophy. However, as will be examined below, while the law does require that contesting interests be balanced against one another, the prevalent regime hardly gives these interests equal weight.

The purpose of this chapter is to finish what was started in chapter II: to develop a framework for the analysis of international animal law. While we have now attained a satisfactory understanding of how moral theories assess the status and treatment of animals, the contesting (legal) theories of animal welfare and animal rights offer a unique perspective to how these moral positions translate into the language of law. In broad terms, the theory of animal welfare postulates that it is acceptable to use animals as things for the purpose of satisfying human needs provided certain 'safeguards' are in place: namely, animals must be

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work seems to suggest that most writings on the topic are second-hand research and relatively uncritical about the existence of the practice; the time may be ripe for a revisionist study based on authentic first-hand materials. Heikki Pihlajamäki, 'History of law in Europe: from Rome to Lisbon' (lecture series, University of Helsinki 2014).

[122] See Sykes, 'Human drama, animal trials: what the medieval animal trials can teach us about justice for animals' (n 120) 302–6.

[123] See Hyde, 'Prosecution and punishment of animals and lifeless things in the middle ages and modern times' (n 119), 696–8.

[124] See Steven M Wise, 'The legal thinghood of animals' (1995–1996) 23 Boston College Environmental Affairs Law Review 471, 471–2; Steven M Wise, *Rattling the cage : towards legal rights for animals* (Profile Books 2001) 9–22.

treated 'humanely' and 'unnecessary' suffering must not be inflicted. The theory of animal rights, consistent with the demands of Regan's theory, rejects the idea that animals have only instrumental value and calls for the abolition of their property status and their institutionalized exploitation.[125] In a nutshell, animal welfare is about *regulating* exploitation, animal rights about *abolishing* it[126]. From here, this chapter continues by examining both positions in turn, after which a final section will address certain issues left unanswered as well as a number of intermediary positions lying between the two extremes.

'Humane treatment', 'unnecessary suffering'

Prior to the 19th century or so, there was little the law either prescribed or proscribed in regard to the treatment of animals. It is fair to say that societies did not consider it legitimate or even necessary to regulate human-animal relations by law. Where law does not exist, the task of regulating conduct falls upon morality, and the moral beliefs shared by those living in early modern societies were a far cry from contemporary attitudes pertaining to animal use. 'Cruelty to animals pervaded eighteenth-century England', writes Mike Radford; 'the majority of the population simply disregarded their suffering, but a significant proportion positively revelled in it.' Only as the 19th century drew near did attitudes begin to change.[127]

One of the earliest legal instruments to afford protection to animals was the 1641 legal code of the Massachusetts Bay Colony, which provided that '[n]o man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use.'[128] However, the first anticruelty law in any modern sense of the word can be traced to 19th-century Britain. In 1821, Richard Martin, Irish member of parliament for Galway, proposed a bill to prevent the ill treatment of horses. While succeeding in the House of Commons, the bill was rejected by the House of Lords and consequently failed to become law. Martin reintroduced a slightly modified bill a year later, this time managing to secure the necessary support from both

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[125] See Francione, *Rain without thunder : the ideology of the animal rights movement* (n 106) 1–2. cf Michael N Widener, 'Collective bargaining as a dispute-reduction vehicle accommodating contrary animal welfare agendas' (2009–2010) 2 Kentucky Journal of Equine, Agriculture, and Natural Resources Law 191, 192.
[126] Francione, *Rain without thunder : the ideology of the animal rights movement* (n 106) 1; Radford (n 7) 9.
[127] Radford (n 7) 3, 5.
[128] The Massachusetts Body of Liberties. See ibid 39, fn 29; Amy B Draeger, 'More than property: an argument for adoption of the universal declaration on animal welfare' (2007) 12 Drake Journal of Agricultural Law 277, 279.

houses. The act, commonly referred to as Martin's Act[129], received royal assent on 22 June 1822 and set the foundations for later British animal legislation.[130]

Since then, animal law has flourished. By 2012, at least 65 states had enacted legal instruments to protect the welfare of animals[131]. Yet despite this proliferation, the language of animal law, for the most part, remains as vague as it was in 1641. The Massachusetts Body of Liberties spoke of 'Tirranny' and 'Crueltie', Martin's Act of 'cruel and improper treatment'. Turning to more contemporary sources, the British Protection of Animals Act of 1911 (a descendant of Martin's Act) makes similar use of the word 'cruel' while adding the concept of 'unnecessary suffering'[132]. Under Florida law,

> [a] person who *unnecessarily* overloads, overdrives, torments, deprives of necessary sustenance or shelter, or *unnecessarily* mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a *cruel* or *inhumane* manner, commits animal cruelty, a misdemeanor of the first degree ...[133]

The Criminal Code of Finland, as a final example, provides that

> [a] person who intentionally or through gross negligence, by violence, excessive burdening, failure to provide the necessary food or otherwise ... treats an animal *cruelly* or inflicts *unnecessary* suffering, pain or anguish on an animal, shall be sentenced for an animal welfare offence to a fine or to imprisonment for at most two years.[134]

None of these instruments offer the kind of concrete guidance that would allow a person to know with absolute certainty in each and every situation the limits of acceptable and unacceptable behavior. Prima facie, the ambiguity of terms such as 'cruel', 'humane', and 'unnecessary' seems to suggest that the law leaves a considerable margin of appreciation to judges and other practitioners. The determination of what constitutes 'necessary' in any particular situation involves the balancing of contesting human and animal interests against one another, this much is true[135]. However, the nature of this balancing act becomes

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[129] See n 118.
[130] See Radford (n 7) 38–9. For further reading on the background to the Martin's Act and later developments in British animal legislation, see Brooman and Legge (n 31) 39–50.
[131] Sabine Brels, 'Animal welfare protection: a universal concern to properly address in international law' (2012) Journal of Animal Welfare Law 34, 35.
[132] (1 & 2 Geo 5 c 27).
[133] Fla Stat § 828.12(1) (emphases added).
[134] Rikoslaki (19.12.1889/39) 17:14 (unofficial translation, emphases added).
[135] Francione, *Animals, property, and the law* (n 53) 4.

fundamentally different once we take into account the fact that, as regards their legal status, modern (Western) legal systems characterize animals as *property*[136].

In *Anarchy, state, and utopia*, Robert Nozick describes an idea according to which the treatment of human beings is governed by Kantian deontological ethics while the treatment of animals depends on utilitarian considerations. This position, 'utilitarianism for animals, Kantianism for people', essentially holds that human beings can *never* be sacrificed for the benefit of other humans (or animals) whereas animals may *always* be sacrificed for the benefit of humans or other animals as long as the benefits outweigh the losses.[137] This idea of double standards has been commended for capturing well the most fundamental characteristics of the theory of animal welfare. Animals *do* matter morally, they just matter less than humans. It is completely acceptable to determine their fate by weighing the consequences flowing from alternate courses of action.[138] Humans, on the other hand, cannot be sacrificed on the altar of utility; humans have legal rights, after all. While rights are rarely absolute in the sense that no transgression could ever be accepted[139], they do, in many respects, delineate certain core areas of protection while also functioning as a last line of defense against attempts that would transgress these boundaries, thus compromising our human dignity or whatever other values we might hold dear. Put differently, there is nothing we *cannot* take from animals if the common good justifies doing so[140], but every human being deserves some basic level of protection regardless of considerations of general utility and even if there would be significant benefits to others.

These double standards are accentuated as we remember that the legal rights of humans include the right to property. Animals *are* that property we have a right to. Therefore, the reconcilement of human and animal interests is something akin to trying to balance the interests of furniture against the interests of its owner. 'The winner of the dispute', as Gary

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136 Following the publication of Gary Francione's *Animals, property, and the law*, the property status of animals has become to be viewed as such an axiomatic characteristic of animal law that virtually no work on the subject will fail to mention it. In addition to practically any other sources cited in this chapter, see eg Steven M Wise, 'Animal thing to animal person—thoughts on time, place, and theories' (1999) 5 Animal Law 61, 62; David Bilchitz, 'Moving beyond arbitrariness: the legal personhood and dignity of non-human animals' (2009) 25 South African Journal on Human Rights 38, 43; Joan E Schaffner, 'A rabbit, is a rabbit, is a rabbit....not under the law' (2013) 1/2013 Global Journal of Animal Law 1.

137 Nozick (n 112) 39.

138 Francione, *Animals, property, and the law* (n 53) 105; Robert Garner, 'Animal welfare: a political defense' (2006) 1 Journal of Animal Law and Ethics 161, 163.

139 cf Veli-Pekka Viljanen, 'Perusoikeuksien rajoittaminen' in Pekka Hallberg and others, *Perusoikeudet* (2nd edn, WSOYpro 2011) 139.

140 cf Francione, *Animals, property, and the law* (n 53) 6.

Francione would say, 'is predetermined by the way in which the conflict is conceptualized in the first place.'[141] It follows that the language of animal welfare theory—what constitutes 'cruelty', 'humane treatment', or 'unnecessary suffering'—cannot be divorced from the fact that the law places animals in a position subordinate to humans, and it follows further that the interests of animals are, consequently, subordinate to the interests of their human owners. The meaning of these concepts, as was noted at the end of chapter I, *has* been twisted out of recognition[142]: they do not correspond to what the same words would mean in colloquial parlance. Since the determination of what is 'unnecessary' or 'necessary' suffering occurs against the backdrop of a system where property owners are prima facie free to do whatever they want with their property, almost *any* benefit, no matter how inconsequential, can be considered as necessitating the suffering of an animal. Any balancing act, then, is rigged: the animal was set out to lose before the balancing even began.[143]

To conclude, the theory of animal welfare is predicated on the fact that legal systems place humans in the rank of persons and animals in the rank of things. Much like in Kant's ethics, persons are ends in themselves and cannot be sacrificed for the common good whereas things are mere means and can be disposed of accordingly. Animal welfare theory holds that it is morally permissible to treat animals as means to human ends as long as animals are treated 'humanely' and not subjected to 'unnecessary' suffering. However, since these safeguards must be understood in the context of humans possessing legal rights to property and animals *being* the property, the law's bias towards human property owners renders most of the key concepts of animal welfare language, as Michael Allen Fox would say, 'empty of meaning'.[144]

The right not to be treated as property

The previous section has, admittedly, painted a rather bleak picture of animal welfare theory. Surely the welfarist approach has done something right during its (roughly) two-century-long reign? For one, *some* protection should obviously be preferred to *no* protection at all. As was noted by Mike Radford[145], 18th-century Englishmen certainly did not harbor attitudes

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[141] See ibid 24, 107.
[142] See n 53.
[143] See Francione, *Animals, property, and the law* (n 53) 5, 18–9, 26, 102–3; Francione, *Rain without thunder : the ideology of the animal rights movement* (n 106) 10.
[144] See Michael Allen Fox, 'On the "necessary suffering" of nonhuman animals' (1997) 3 Animal Law 25, 28. See generally Francione, *Animals, property, and the law* (n 53) 18, 26; Francione, *Rain without thunder : the ideology of the animal rights movement* (n 106) 10.
[145] See n 127.

favorable to nonhuman life. Whatever one may think of utilitarian theory, at the very least it has been responsible for cultivating more compassionate attitudes towards animals which, in turn, has enabled social reform and the development of modern animal law. 'Much to their lasting credit', writes Tom Regan, 'the classical utilitarians championed the cause of animal welfare, something for which all who work for the improved treatment of animals are indebted.'[146] Modern animal rights theory would hardly exist were it not for utilitarianism and animal welfare theory[147].

Welfarism, too, has its defenders. Robert Garner, in an aptly-named journal article, gives a more favorable account of animal welfare theory as he describes it as a 'compromise between regarding animals as having no direct moral standing', on the one hand, 'and treating [them] as morally equivalent to humans', on the other[148]. Depicting the indeterminacy of the language of anticruelty and welfare laws as a strength rather than weakness, he argues that the flexibility of the concept of 'unnecessary suffering' embodies considerable potential for incremental reform. 'Thirty years ago or so', he writes, 'the wearing of fur and the testing of cosmetics on animals was regarded as acceptable. Now, many people in the Western world frown upon both practices.'[149] It is true that in the right hands, the language of existing animal law may permit certain forms of exploitation being slowly moved from the category of permitted to that of proscribed. Moreover, the fact that there is some existing political consensus on the impermissibility of subjecting animals to gratuitous pain and suffering may facilitate the adoption of stricter measures of protection in the future—at least in theory.

That said, the fact that welfarism no doubt has some redeeming qualities does not change the fact that it leaves much to be desired. Those adopting a rights view cannot help but find the tenets of animal welfare irreconcilable with their own moral beliefs. Insofar as the (lowly) status of animals in the consequentialism of welfare theory is concerned, it is fair to say that we are *all* those utility monsters Nozick warned us about[150]. Beyond critique on grounds of morality, anticruelty statutes, for example, often fail to extend protection to those animals most vulnerable to poor welfare as they exclude, inter alia, agricultural practices from their

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146 Regan (n 28) 202.
147 It is a different question, however, whether even the classical utilitarians would condone the present incarnation of welfare theory. Even those who reject the notion of animal rights may have difficulties accepting the amount of animal abuse permitted under contemporary animal law. See Francione, *Animals, property, and the law* (n 53) 261.
148 Garner (n 138) 162.
149 ibid 166.
150 See n 112.

scope[151]. Moreover, the notorious ambiguity of welfarist concepts is not helped by the fact that, as a British court duly noted, even extreme pain is manifestly not by itself sufficient to place suffering outside the realm of necessity[152]. Ultimately, a concern shared by many is that as long as animal welfare theory fails to reject the property status of animals, no meaningful protection for animals can exist[153].

As was said at the beginning of this chapter, the theory of animal rights seeks, as a matter of law and in broad terms, not to regulate but to abolish animal exploitation. This is admittedly a tall order: seeing as how animal exploitation pervades modern societies from the production of food and clothing to the supply of products designed for companion animals and the use of animal products in musical instruments, it is beyond doubt that '[t]here are powerful economic, legal, political, and social forces that militate against treating property as anything other than property.'[154] Against such a backdrop it would be utopian to believe that the primary route to abolition should be in advocating legal reform amounting to a blanket ban on some or all forms of exploitation: in the absence of a sudden and unprecedented global shift in moral sensibilities, there is simply no way such aims would attract political support. Not surprisingly, many abolitionists seek their ultimate goal outside the realm of law. A common strategy is adopting and educating others about a vegan diet[155]. The idea is that in the long run, increased prevalence of veganism leads to the abolition of animal exploitation.[156]

Whether abolitionists have been successful in converting people to veganism will be examined in the next section. As a general matter, however, it is fair to say that the view that animals have *moral* rights has thus far failed to translate into *legal* rights for any animal species. No state has recognized animals as possessing legal rights[157], even though at times there have been

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151 David Favre, 'An international treaty for animal welfare' (2011–2012) 18 Animal Law 237, 244.
152 See *Ford v Wiley* (1889) 23 QBD 203. Neither is death, in and of itself, considered to be an instance of subpar welfare. A particularly 'cruel' or 'inhumane' death, of course, may (or may not) be another matter. See Radford (n 7) 275.
153 Garner (n 138) 168. See Alan Watson, 'Rights of slaves and other owned-animals' (1997) 3 Animal Law 1, 6; Stephen A Plass, 'Exploring animal rights as an imperative for human welfare' (2009–2010) 112 West Virginia Law Review 403, 412.
154 Francione, 'Reflections on *Animals, property, and the law* and *Rain without thunder*' (n 15) 38.
155 While there is no authoritative definition of veganism—that is, some activists understand the concept as prohibiting certain products other activists would permit (eg honey or silk)—, a working definition for our present purposes is that veganism is the abstinence from animal products. Note that veganism is not only about animal food but also about other animal products such as clothing items. See OUP, 'vegan' (*Oxford Dictionaries*) <http://www.oxforddictionaries.com/definition/english/vegan> accessed 20 September 2014.
156 Elizabeth L DeCoux, 'Speaking for the modern Prometheus: the significance of animal suffering to the abolition movement' (2009–2010) 16 Animal Law 9, 18. See Francione, 'Reflections on *Animals, property, and the law* and *Rain without thunder*' (n 15) 41–2.
157 Oja (n 29) 81, 95.

reforms that have gone well beyond what animal welfare theory would dictate. Since welfarism is so deeply committed to the belief that animals are rightless things, it is interesting to note that both the civil codes of Germany and Austria state expressly to the contrary: animals are *not* considered things. Yet it does not follow that the rejection of the thinghood of animals (which seems to be more of a semantic point at any rate) would entail legal rights. The relevant provisions simply state that animals are not things, legally speaking, and that they are protected by special laws: '*Tiere sind keine Sachen; sie werden durch besondere Gesetze geschützt*.'[158]

As of 1999, New Zealand legislation has made it increasingly difficult to justify (legally) the use of nonhuman hominids in scientific research. Pursuant to the Animal Welfare Act, nonhuman hominids may not be used in 'research, testing, or teaching' without prior approval from a governmental authority[159]. The governmental authority, however, may not give approval unless she is satisfied that the use of a nonhuman hominid is in the best interest of the hominid itself or, alternatively, that the use is in the best interest of its species *and* that any harm to the hominid is outweighed by the benefits of its use[160]. This is arguably a strict prohibition that is prima facie difficult to circumvent[161]. Moreover, it is clearly at odds with welfarist theory in that human interests are rendered inconsequential: unless the criteria of section 85(5) are met, *no human interest* can justify testing. However, it is well-established that while animal rights lobbyists did everything in their power to contribute to the drafting of the act, nothing about it is conducive to recognizing nonhuman hominids (or any other animals) as possessing legal rights[162]. Nor does the fact that the Indian Ministry of Environment and Forests declined to allow the establishment of a dolphinarium in India (and recommended

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[158] BGB § 90a; ABGB § 285a. As a sidenote, welfarism does not, as a matter of principle, view all forms of property as indistinguishable from one another; some forms may be subject to special regulation inapplicable to others. In this regard, animals can, even under animal welfare theory, be considered a *special* kind of property. cf Visa Kurki, 'Voiko eläin olla oikeussubjekti?' (2013) Lakimies 436, 439; Victoria Ridler, 'Dressing the sow and the legal subjectivation of the non-human animal' in Yoriko Otomo and Ed Mussawir (eds), *Law and the question of the animal : a critical jurisprudence* (Routledge 2013) 104–5. It follows that the approach taken by Germany and Austria is perhaps not that novel after all.

[159] Animal Welfare Act 1999 § 85(1).

[160] § 85(5).

[161] Though all it seems to take is a Director-General who has a very liberal idea of what is in the best interest of a hominid or its species.

[162] See generally Rowan Taylor, 'A step at a time: New Zealand's progress toward hominid rights' (2001) 7 Animal Law 35. See Paula Brosnahan, 'New Zealand's Animal Welfare Act: what is its value regarding non-human hominids?' (2000) 6 Animal Law 185, 189.

that all like proposals be rejected in the future)[163] entail cetacean rights in the Indian legal system.

Animal rights theory has been around for decades, but thus far it has failed to translate moral rights into legal ones. Since the abolition of animal exploitation though legal reform is not a politically feasible strategy[164], it is not surprising that the most uncompromising animal rights activists have turned to veganism, thereby seeking to influence reform outside of law. Ultimately, abolitionism holds that animals only require one single right: '*the right not to be treated as the property of humans'*. However, according to Gary Francione, such a right will not be achieved until the institutionalized exploitation of animals has been abolished, bringing domesticated animals into existence is ceased, and non-domesticated animals and their habitats are left alone.[165]

Making subjects out of objects

All things considered, has either theory managed to alleviate the plight of animals? 'Abolitionists have worked for a few decades, and Welfarists for much longer, seeking to benefit animals. Yet the suffering and exploitation of animals continue unabated', writes Elizabeth DeCoux [166] . Assuming the theory of animal welfare is every ounce as anthropocentric and exploitative as has been claimed above, it is difficult to see how one could reasonably consider its approach a success by any standards: while it does (ostensibly) afford many animals protection against human abuse, it also excludes many practices from regulation while its model of 'utilitarianism for animals', inasmuch as it appears to take animals' interests into account fully and equitably, serves only to legitimize the subordinate status of animals as well as any form of exploitation that can be justified by appeal to general utility[167]. If there indeed is a 'movement' that aims at the 'liberation' of animals or at the very least to offer them some relief of pain and suffering, such a movement would not likely be satisfied with the underinclusive and vague character of welfarist regulation[168].

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[163] Central Zoo Authority, 'Policy on establishment of dolphinarium' (17 May 2013) F No 20–1/2010–CZA(M)/2840.
[164] cf Schaffner, *An introduction to animals and the law* (n 7) 182.
[165] See Gary L Francione, 'The abolition of animal exploitation' in Gary L Francione and Robert Garner, *The animal rights debate : abolition or regulation?* (Columbia University Press 2010) 1 (emphasis added).
[166] DeCoux (n 156) 14.
[167] cf Francione, *Rain without thunder : the ideology of the animal rights movement* (n 106) 189.
[168] See DeCoux (n 156) 19.

On the other hand, neither has the rights view attained its goal of abolishing the property status of animals and their institutionalized exploitation. As the above discussion evidences, no modern society views animals as something that cannot be owned by humans, and neither do animals enjoy true legal rights in any society. At the beginning of this chapter, I stated that the theory of animal rights offers a unique perspective to how a moral position attributing rights to animals translates to the language of law. The translation seems to be this: law cannot liberate animals, it cannot eradicate their status as property. Since the strategy of the position of animal rights proper seeks to abolish the property status of animals indirectly by converting the world to veganism, thereby removing the demand for animal products, its effectiveness must be assessed by asking whether it *has*, as an empirical matter, managed to promote veganism and resulted in any meaningful change of affairs. This does not seem to be the case; while there *are* vegans and entire organizations promoting veganism in contemporary societies, and business enterprises increasingly cater to consumers refusing to use animal products, the amount of individuals committed to veganism, if anything, seems to be on the decline.[169]

Since the extreme positions of welfare and abolition seem to require that one either accepts the status quo as just and desirable, or commits to a view that is politically difficult to promote and ultimately leads to, for example, the disappearance of all domesticated animals[170], intermediary positions have flourished. There is considerable variety between the two extremes, so only some positions will be examined here. Firstly, it has been the strategy of some activists in recent years to bring cases before courts on behalf of specific animals. Occurring in common law counties in particular, the aim of this practice is to challenge the property status of animals by seeking to inspire judges to question the axioms of personhood and traditional animal law, thereby creating precedents favorable to future emancipation.[171] Thus far, however, no benches have been ready or willing to recognize that animals could have standing or possess any kind of legal rights the law ought to protect[172]. As Steven Wise readily admits, there are, as the state of affairs is, significant physical, economic, political,

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169 See ibid 18, 25, 27.

170 See Susan J Hankin, 'Not a living room sofa: changing the legal status of companion animals' (2006–2007) 4 Rutgers Journal of Law and Public Policy 314, 382.

171 Ciméa Barbato Bevilaqua, 'Chimpanzees in court : what difference does it make?' in Yoriko Otomo and Ed Mussawir (eds), *Law and the question of the animal : a critical jurisprudence* (Routledge 2013) 75. See eg Nonhuman Rights Project, 'Why the Nonhuman Rights Project is unique' <http://www.nonhumanrightsproject.org/why-the-nonhuman-rights-project-is-unique/> accessed 18 August 2014.

172 See eg *Tilikum et al v Sea World Parks & Entertainment Inc et al* (2012) 842 F Supp 2d 1259; Martin Balluch and Eberhart Theuer, 'Trial on personhood for chimp "Hiasl"' (2007) 24 Alternatives to Animal Experimentation 335.

religious, historical, legal, and psychological obstacles to ending 'nonhuman animal slavery'[173]. Moreover, involving animals in trials faces considerable difficulties pertaining to, inter alia, agency[174].

Secondly, some authors have sought to address the problems of traditional welfare theory by taking the idea of a 'special' kind of property a step further. David Favre, for example, proposes a new category of 'living property'[175]. Under this new category, animals have the right, inter alia, 'not to be harmed', 'to be cared for', 'to be properly owned', and 'to file tort claims'[176]. Susan Hankin, on the other hand, would establish a category of 'companion animal property', thereby ensuring that decisions on custody, for example, would be more sensitive to the interests of the animals involved[177]. This is a position much less dramatic than abolition since it is premised on the acceptance of the property status of animals instead of rejecting it out of hand. Consequently, it is also politically more feasible.

Finally, some authors have taken a route more theoretical compared to the rather practical approach of challenging existing doctrines before courts by exploring the possibility of animals as *subjects of law*. The argument generally begins by observing that the division of beings into subjects and objects is arbitrary. Animals are generally disqualified because they cannot bear legal responsibilities in any meaningful way. This follows from the belief that human law is a normative system regulating the behavior of *humans*, not animals.[178] Modern legal systems do, however, recognize certain fictional entities, such as corporations, as legal subjects. This is in spite of the fact that these so-called legal persons, as they only exist as aggregates of natural persons, cannot meaningfully bear or discharge any duties by themselves. Legal persons can only act through individual human agents.[179] Those advocating the possibility of animal subjectivity generally hold that subjectivity is a matter of convention, of

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[173] Steven M Wise, *Unlocking the cage : science and the case for animal rights* (Perseus Press 2002) 9–23.
[174] See Bevilaqua (n 171) 81. cf Sykes, 'Human drama, animal trials: what the medieval animal trials can teach us about justice for animals' (n 120) 280.
[175] David Favre, 'Living property: a new status for animals within the legal system' (2009–2010) 93 Marquette Law Review 1021.
[176] ibid 1062.
[177] See Hankin (n 170), 376–93 in particular.
[178] See Kurki, 'Tarvitaanko eläinten oikeuksia? Eläinten oikeussubjektiviteetin mahdollisuus ja hyödyt' (n 7) 29, 31; Kelsen (n 10) 31.
[179] See Bevilaqua (n 171) 84.

will. Animals *can* be subjects of law if only one wills it; it is a wholly different matter, of course, whether this would have any meaningful bearing on the way in which they are treated.[180]

To my knowledge, Visa Kurki is currently writing a doctoral dissertation on animal subjectivity at the University of Cambridge, and Susanna Lindroos-Hovinheimo from the University of Helsinki also plans to approach the question of animals from the perspective of subjectivity. It remains to be seen what emerges from their work. Perhaps the end product of their or others' work is an exception to current doctrine, a *special* type of subjectivity only available to nonhumans. It must be borne in mind, however, that a more profound inclusion of animals in the normative system of human law may seem prima facie favorable, but it can also give rise to concerns. It is one thing to owe legal duties to something over which we do not claim jurisdiction; it is another to owe duties to something on the basis of that something being a subject of law. The legal 'subjectivation' of a being is, as Victoria Ridler points out, premised on the idea that 'certain beings (the human animal) may define law and its subjects such that other beings (the non-human animal) would be subject to its laws.'[181] To be a subject *of* the law is simultaneously to be subject *to* it. As Étienne Balibar formulates the question,

> why is it that the very name which allows modern philosophy to think and designate the originary freedom of the human being—the name of 'subject'—is precisely the name which historically meant suppression of freedom, or at least an intrinsic limitation of freedom, i.e. *subjection*?[182]

If Antony Anghie has taught us anything, it is that when the strong choose to include the weak in a normative system designed by the strong and for the strong, it, while ostensibly beneficial, might not truly be in the latter's interest. Chances are one form of oppression is simply traded for another.[183]

In chapter II, we peered into moral philosophy in order to understand how differently philosophers have approached the moral status of animals and the rightness and wrongness of their treatment. In this chapter, we sought to supplement our perspective by exploring how animals and the acceptable boundaries of their treatment are characterized under the law. It

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[180] See Kurki, 'Tarvitaanko eläinten oikeuksia? Eläinten oikeussubjektiviteetin mahdollisuus ja hyödyt' (n 7) 24, 32, 51.
[181] See Ridler (n 158) 110–3.
[182] Étienne Balibar, 'Subjection and subjectivation' in Joan Copjec (ed), *Supposing the subject* (Verso 1994) 8 (emphases modified, footnotes omitted).
[183] cf Antony Anghie, *Imperialism, sovereignty, and the making of international law* (CUP 2005) 18–30. Anghie's analysis of Vitoria's inclusion of the Indians in *jus gentium* is remarkably analogous to how reason (or lack thereof) has been used in moral philosophy to justify the inclusion or exclusion of animal interests from moral consideration.

would seem that during the early modern period and the historical periods that preceded it, morality did not take any great interest in the status and treatment of animals, nor did the law. Entering the late modern period, attitudes towards animals became more compassionate and the development of modern animal law, which primarily means anticruelty and welfare laws in conjunction with the doctrine of animals being property, was greatly influenced by utilitarian philosophy. Nearly two hundred years later, the manner in which the law regulates the treatment of humans and animals continues to be 'utilitarianism for animals, Kantianism for people', as explained by Robert Nozick. Animal rights theory, while having spawned a considerable body of academically interesting literature, has thus far failed to result in legal rights for animals or the abolition of the institutionalized exploitation of animals. The theoretical framework of this thesis now completed, it remains to be seen how international animal law connects to these findings.

IV INTERNATIONAL ANIMAL LAW

> Modern Western legal systems are feeling the need to alter their conceptual framework so as to accommodate animal rights. Organisations such as Europe for Animal Rights have been pressing for the creation of an appropriate international framework to enforce animal welfare standards. Within domestic jurisdictions animal welfare has been the subject of detailed Acts and regulations, and questions of animal welfare have even been the subject of constitutional court decisions in Germany ... laying down basic guidelines about how legislatures should draw up ordinances regarding animal welfare law ... International law needs also to work towards developing principles, procedures and institutions which can move away from the treatment of non-human life as rightless objects and towards investing it with essential safeguards and affirmative protection.[184]

Suppose international law is a complete system. Assuming the validity of this postulate, international law should apply to *any* international matter.[185] Whether the treatment of animals is an 'international matter' is, of course, open to debate. On the one hand, there is good reason to believe that the exploitation of resources held in common is something states may want international law to regulate—and in fact it already does. In the absence of rules specific to some particular form of resource use or management, most imaginable situations should be capable of being solved by reference to two residual rules which are fundamental to the international legal order: territorial sovereignty and the freedom of the high seas. As we shall

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[184] CG Weeramantry, *Universalising international law* (Martinus Nijhoff Publishers 2004) 196–7.
[185] cf Martti Koskenniemi, '"The lady doth protest too much" : Kosovo, and the turn to ethics in international law' (2002) 65 Modern Law Review 159, 161.

see below, states' use of their natural wealth and resources within the confines of their land territory and the territorial sea is, lacking any rule to the contrary, simply a matter of permanent sovereignty over these resources. Outside this sphere of sovereign control, states' use of natural resources not subject to the exclusive jurisdiction of any state is—again, lacking any rules to the contrary, such as those peculiar to certain maritime zones—largely subject to the freedom of any state to exploit the natural resources of the high seas. These two rules, very general in character, set a standard which many treaty-based and customary obligations modify or restrict further. Still, as the Permanent Court's decision in the *Lotus* case[186] serves to underline, international law is, as Jan Klabbers puts it, 'a *permissive* system; behaviour must be considered permitted unless and until it is prohibited.'[187] It follows that states *may* exploit animals, as *natural resources*, to the extent that the legal order does not expressly state to the contrary.

On the other hand, it is a wholly different question whether *any* human treatment of animals, as a more general issue, is something the international legal order should be interested in. As was stated already in chapter I, international law is, by and large, a system intended to govern the conduct of *states*. Sometimes the nature of the international legal order has been explained through a metaphor that the states who make up the international community are like boxes on a shelf. The legal order is interested in what happens *between* the boxes, not what goes on *inside* them.[188] Why should this legal order reach past the skin, as it were, of states all the way into their population and even to individual human beings and regulate their treatment of animals? Put this way, is the treatment of animals in general an 'international issue'?

There is good reason to answer in the positive. As an empirical matter, there *are* treaties that attempt to protect the welfare of animals. The European convention for the protection of animals for slaughter[189], for example, regulates (inter alia) the unloading and stunning of animals prior to slaughter[190]. But it is clear that *states* are not capable of wielding puntillas, hammers, or pole-axes. In line with what has been said above about legal persons and agency, it is not states but the people of which they consist who are the addressees of these rules. The

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[186] See n 19.
[187] Klabbers, *International law* (n 33) 22 (emphasis added).
[188] Jan Klabbers, 'Principles of public international law' (lecture series, University of Helsinki 2011). This metaphor oversimplifies the matter, of course; under international human rights law, for example, it is very much a matter of interest for the international legal order how states treat individual human beings—what happens 'inside the box', as it were.
[189] (adopted 10 May 1979, entered into force 11 June 1982) ETS 102.
[190] See articles 3–4, 12, 16–18.

fact that what goes on inside abattoirs is hardly 'international' in any reasonable interpretation of the word has not stopped states from adopting instruments governing the micro-level treatment of animals, as the existence of the slaughtering convention goes to prove. Moreover, there exist some regimes that, due to their almost universal acceptance, make the management of the welfare of *some* animals in *some* contexts a universal issue.

The theory of animal welfare, as Mike Radford would probably word it, 'has succeeded in persuading domestic policy makers that it is both legitimate and necessary to regulate by law ... the way in which animals should be treated'[191]. But this interest in the treatment of animals is no longer limited to domestic jurisdictions. 'Protecting animals from suffering and cruelty', writes Amy Draeger, 'is a universal issue that, like other universal issues, is a legitimate subject of international agreement.'[192] International animal law, then, pertains both to the macro- and micro-levels of animal exploitation. It regulates the exploitation of animals by states as a very broad matter, but also, sometimes, the treatment of animals by individual human beings. Thus, the analysis carried out in this chapter seeks to encompass both extremes of the law.

Before beginning with the analysis *in concreto*, two preliminary issues must be addressed briefly. The first pertains to the scope and the focus of the study, that is, the selection of materials; the second to the interpretation of the materials selected. These concerns will now be addressed, both in turn, after which the focus shifts to the substance (and ethics) of international animal law itself.

Delimitation of scope

Turning to the first issue, this is a study of *public international law*. The system of public international law gave, in the 1950's, birth to the European Communities[193]. Yet even though the legal rules adopted under the auspices of the Communities, now known as the European Union ('EU'), are clearly 'international' in the sense that they operate on a level above and beyond the confines of any single sovereign state, this body of community or EU law is clearly separate from public international law. Not only are the two separated in the academic

[191] See Radford (n 7) 4.
[192] Draeger (n 128) 297.
[193] See Treaty between the Federal Republic of Germany, the Kingdom of Belgium, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands instituting the European Coal and Steel Community (adopted 18 April 1951, entered into force 23 July 1952) 261 UNTS 143; Treaty establishing the European Economic Community (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 11; Treaty establishing the European Atomic Energy Community (EURATOM) (adopted 25 March 1957, entered into force 1 January 1958) 298 UNTS 169.

teaching of law, the Union itself is very aware of its distinct character, which was emphasized as early as 1963 when the European Court of Justice observed that 'the Community constitutes a *new legal order of international law*'[194]. 'By contrast with *ordinary* international treaties', it continued a year later,

> the EEC Treaty has created *its own legal system* which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[195]

It cannot be disputed that the EU has taken significant steps towards improving the welfare and protection of animals. Its very founding instruments now concede that animals are sentient[196] while its legislative acts regulate, inter alia, the slaughter of animals[197], the maintenance of laying hens[198], and the use of animals in scientific research[199]. Still, while my method has been interdisciplinary in the sense that I have not only departed from international law to animal law but also to animal ethics, I shall not attempt to mix EU law and public international law here. The remainder of chapter IV focuses on international law proper, the history and significance of EU animal law being a story best told elsewhere.

Continuing with the topic of scope and focus, it is obvious that present constraints could never allow for a comprehensive study of *all* of international animal law. In chapter I, I already lamented the fact that including all primary sources of international law—treaties, custom, and general principles—would have been too broad a scope for an Master's thesis, and consequently excluded the two latter as objects of study in this work. A problem remaining is that the sheer amount of treaty-law pertaining to animals makes it impossible still to account for all of it. Besides, not all of these instruments are alike: some pertain only to a single species

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[194] Case C-26/62 *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* [1963] ECR 1, 12 (emphasis added).
[195] Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR 585, 593 (emphases added).
[196] Consolidated version of the treaty on the functioning of the European Union (2008) OJ C 115/47, article 13.
[197] See Council directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing (1993) OJ L 340/21.
[198] See Council directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens (1999) OJ L 203/53.
[199] See Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes (2010) OJ L 276/33.

of animals, some ostensibly cover all of them; some apply to trade in animal specimens, others to their hunting; some regulate the treatment of animals more directly while others protect them indirectly by regulating the management of their habitats; and so on. There is a need, then, to systematize and to delimit—but how to do it?

Much like domestic legal systems, international law, too, fails to comprehensively include *all* animals within the scope of express regulation. David Favre has noted that existing treaties divide, whether explicitly or implicitly, animals into two categories: wildlife and domestic. While European states have been particularly active in developing instruments in regard to domesticated animals, no treaty or other instrument regulates the treatment of domesticated animals on a global basis.[200] But the law not only distinguishes the wild from the domesticated, it also places significant emphasis on what a particular animal is used for. As Joan Schaffner has observed, each human use of animals raises different legal issues and thus requires a regime of its own to address these issues. Whereas the legal regulation of, say, companion animals may differ greatly from that of animals used for farming purposes, it is also possible that a single animal or a species of animals falls under several regimes depending on the situation. Dogs are often kept for companionship, but they may also be used for research. 'The law', then, 'treats the same animal differently depending upon the human's use of the animal.'[201]

As I see it, international animal law is not a unified, consistent body of law regulating human-animal interaction. To the contrary, this field of international law is quite fragmented and covers a great expanse of human and state behavior involving animal objects. Recalling what was said in chapter II, it is relevant to ask how the law perceives animals. From the outset, it would seem that there are, in broad terms, three spheres of animal regulation present in the contemporary international legal system. Firstly, as was hinted above, some parts of the law deal with animals as *resources*. This sphere is premised on broad and far-reaching rules that organize how natural resources are to be exploited and conserved, though at times the rules governing conservation can also take a highly detailed and technical appearance. The key characteristic of this branch of the law is that animals are not seen as individuals but as parts of a greater concept of natural, living, or biological resources that may encompass several

[200] See Favre, 'An international treaty for animal welfare' (n 151) 245.
[201] See Schaffner, *An introduction to animals and the law* (n 7) 11.

species or hierarchically higher-ranking taxa of animals. This sphere, then, is about macro-level regulation.

Secondly, there is an ever-growing body of the law that seeks to preserve and protect animals as members of a particular *species* or group thereof. Unlike the rules governing the exploitation of the natural resources of the seas and oceans, for example, which rarely take an interest in what individual animals swim around in a particular maritime zone, instruments in this branch of the law identify some animals by reference to their species as deserving special protection. Some instruments, for example, name several species and place trade in these species under strict conditions. Others may identify a particular geographical area or certain identifiable habitats wherever they might occur as subject to conservation, whereby species deemed important (but also other animals) are protected insofar as they happen to dwell in these designated areas.

Rules in this group do often, in practice, regulate the treatment of individual animals, such as in the attempted export of an individual specimen belonging to a protected species. But they do not do so because they would be somehow intimately interested in safeguarding the welfare of individual animals regardless of what species they belong to or what their conservation status is: quite the contrary, in this sphere, individual animals become objects of the law for the sole reason that they belong to a species that is considered worthy of special protection or otherwise more important that other species. The interaction of this branch with individual animals, then, is largely incidental. If the first sphere was said to be about macro-level protection, this sphere is a hybrid residing somewhere between the micro- and the macro-level perspectives.

Thirdly and finally, there are instruments that, while they may refer to animals through their type of use, are essentially interested in how *individual animals* are treated. This group differs from the first one in that the discretion left to states (or individuals) in regard to treatment is much less limited. Fisheries agreements, for example, do not generally prescribe how individual fish ought to be handled in the process of exploitation. This group also differs from the second one in that its reason for protecting animals is not premised on these animals being threatened with extinction or otherwise in dire need of preservationist efforts. The second group's occasional focus on individual animals is incidental; here, the entire point is to set standards for the treatment of individual animals. Natural resources or species are not gassed

in slaughterhouses: individual animals are. Consequently, this sphere is about micro-level regulation.

This division of international animal law into three spheres does not change the fact that the breadth of treaty-law pertaining to animals is still impossible to be accounted for comprehensively in this thesis, but it does facilitate the selection of materials for closer scrutiny. The remainder of chapter IV will examine each of these three spheres in turn by focusing on a single instrument I believe best represents the core characteristics of that sphere. The first sphere is exemplified through the United Nations convention on the law of the sea[202] ('UNCLOS') as representing the global regulation of fishing. Drafted with the intention to comprehensively regulate the law of the sea, fisheries and marine scientific research included[203], the UNCLOS, with 166 parties as I write this[204], is clearly the largest and most significant instrument governing fishing under international law. The second sphere, that of international conservation law, will be addressed by reading the Convention on international trade in endangered species of wild fauna and flora[205] ('CITES'). The CITES, often praised for its effectiveness and significance, is the main international legal instrument regulating trade in endangered species[206]. With 180 parties[207], it is one of the most universally-accepted conservation treaties in existence.

The third and final sphere is best represented by a treaty governing animal welfare. As is notorious among international animal lawyers, however, no universal legal instrument on animal welfare currently exists[208]. The examination of the third sphere therefore takes a more regional approach. It has been observed that the Council of Europe ('CoE') was the first supranational organization to legislate on animal welfare matters on the international plane[209]. Consequently, the treaties adopted under its auspices were the first international agreements to

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[202] (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
[203] See Birnie and Boyle (n 3) 655.
[204] UNTC, 'United nations convention on the law of the sea' <https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en > accessed 19 August 2014.
[205] (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.
[206] See eg Don W Allen, 'The rights of nonhuman animals and world public order: a global assessment' (1983–1984) 28 New York Law School Law Review 377, 401; Nordström (n 23) 88; Brooman and Legge (n 31) 378, 384; Birnie and Boyle (n 3) 625; Chris Wold, 'The status of sea turtles under international environmental law and international environmental agreements' (2002) 5 Journal of International Wildlife Law and Policy 11, 30.
[207] CITES, 'Member countries' <http://www.cites.org/eng/disc/parties/index.php> accessed 19 August 2014.
[208] Favre, 'An international treaty for animal welfare' (n 151) 237. See Stuart R Harrop, 'The dynamics of wild animal welfare law' (1997) 9 Journal of Environmental Law 287, 289.
[209] See Isabelle Veissier and others, 'European approaches to ensure good animal welfare' (2008) 113 Applied Animal Behaviour Science 279, 280.

lay down 'ethical principles for the transport, farming and slaughter of animals as well as for their use as pets and for experimental purposes.'[210] While, indeed, the CoE treaties govern a wide range of animal uses, the treaty best exemplifying the welfare aspects of European treaty-law is the European convention for the protection of animals kept for farming purposes[211]. With 33 ratifications or accessions as I write this[212], it is also among the most widely accepted of the CoE animal treaties.

Interpreting ethically

Turning to the second preliminary issue, how are these representative instruments to be interpreted? Thankfully, since the selected instruments are treaties, the international legal order itself provides considerable guidance for the task at hand. Moreover, chapters II and III of this thesis developed the vocabulary necessary for understanding the moral implications of the law. Understanding the ethics of international animal law lies in the combination of these two elements, the general rules governing the interpretation of treaties taken together with the theoretical framework developed earlier in this thesis.

Treaties, as is well-established, are international agreements 'concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'[213]. The Vienna convention on the law of treaties ('VCLT') entered into force in 1980, and has since come to comprehensively regulate most if not all matters pertaining to treaties. Now, two out of the three treaties examined more closely here—the CITES and the European convention for the protection of animals kept for farming purposes—were concluded *before* (1975 and 1978 respectively) the entry into force of the VCLT. Pursuant to article 4 of the convention, it applies only to treaties which are concluded by states *after* the entry into force of the VCLT with regard to the states in question. However, this does not preclude the application of such rules of the convention that exist simultaneously elsewhere in international law, such as rules of custom.

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[210] V Caporale and others, 'Global perspectives on animal welfare: Europe' (2005) 24 Scientific and Technical Review of the Office International des Epizooties 567, 568.
[211] (adopted 10 March 1976, entered into force 10 September 1978) ETS 87.
[212] CoE, 'European convention for the protection of animals kept for farming purposes' <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=087&CM=1&DF=&CL=ENG> accessed 19 August 2014.
[213] Vienna convention on the law of treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, article 2.

The VCLT also regulates the interpretation of treaties and, in this regard, is seen as codifying existing customary law on the point. Indeed, as the case of *Kasikili/Sedudu island* evidences, the ICJ saw no reason not to apply the rules of the convention to a bilateral treaty between Great Britain and Germany that had been concluded in 1890, some 90 years prior to the entry into force of the VCLT.[214] Therefore, it is only fitting that we take the provisions of the VCLT as a starting point in our endeavor to understand international animal law.

The general rule of interpretation states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[215] This provision combines three schools of interpretation: the textual, the contextual, and the teleological[216]. Whilst the three are prima facie in equal balance as far as article 31 is concerned, the jurisprudence of the ICJ has emphasized textual interpretation as a starting point. 'Interpretation must be based above all upon the text of the treaty', the Court says, but of course the words of the text must be given their natural and ordinary meaning *in the context in which they occur*. Regard must also be had to the spirit and purpose of the instrument being interpreted as well as the intention of the contracting parties.[217] Since the text of a treaty is, all things considered, the first priority of the interpreter, it is of particular relevance to the following reading of the three treaties that the VCLT expressly likens the preamble of a treaty to the actual substance of its articles[218]. The following reading, then, insofar as the rules of the VCLT are concerned, will take the preambles of the treaties duly into account.

However, for our present purposes it is not enough to simply read the treaties in accordance with article 31 of the VCLT. We are interested in the *ethics* of international animal law, and

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[214] See *Kasikili/Sedudu island (Botswana v Namibia)* [1999] ICJ Rep 1045, para 18. See also *Territorial dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; *Oil platforms (Iran v USA)* (Preliminary Objection) [1996] ICJ Rep 803, para 23; *Dispute regarding navigational and related rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, para 47.

[215] Article 31(1).

[216] Malgosia Fitzmaurice, 'The practical working of the law of treaties' in Malcolm D Evans (ed), *International law* (3rd edn, OUP 2010) 184. See Klabbers, *International law* (n 33) 52–4. cf Anthony Aust, *Modern treaty law and practice* (2nd edn, CUP 2007) 231, 234.

[217] See *Polish postal service in Danzig* (Advisory Opinion) PCIJ Rep Series B No 11, 39; *Competence of Assembly regarding admission to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8; *Anglo-Iranian Oil Co (UK v Iran)* (Preliminary Objection) [1952] ICJ Rep 93, 104; *South West Africa (Ethiopia v South Africa, Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 336; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53, para 48; *Territorial Dispute* (n 214) para 41.

[218] I believe this is evident in the way article 31(2) of the convention states that '[t]he context for the purpose of the interpretation of a treaty shall comprise, *in addition to the text, including its preamble* and annexes' the instruments mentioned in points (a) and (b) of the paragraph (emphasis added). It would seem, then, that 1) the preamble is part of the text while 2) the text forms part of the context.

nothing in the VCLT seems to place any emphasis on divining what moral principles inspired a particular treaty or what the moral implications of its provisions are. The generally accepted rules of treaty interpretation *do* allow us to learn what states must (or must not) do to discharge their obligations under a treaty, but the moral implications of these obligations can only be understood when assessed against the theoretical framework developed in chapters II and III.

Consequently, the approach taken in the sections below can be described in the following terms. I will begin each section by outlining some of the most important and outstanding issues and characteristics specific to each of the three spheres of international animal law. Once this task has been completed, I will identify and describe those provisions of the three selected treaties that are directly relevant to the approach described at the beginning of chapter II, that is, how a particular instrument perceives an animal and the manner in which they are to be treated. This means that my analysis will take at face value or exclude altogether many provisions international legal scholarship would ordinarily be interested in (insofar as the attempt would be to comprehensively describe a treaty). As I see it, rules that, for example, set up organs specific to a treaty regime or describe in detail how compliance is to be enforced or disputes resolved have no direct bearing on how these treaties perceive animals or their acceptable treatment. As such, the focus of my interpretation lies (only) with those rules that are essential for understanding the moral implications of these instruments.

Having described the relevant provisions, the focus shifts to the assessment of their moral implications. This is achieved by contrasting the rules to the moral and legal positions described in chapters II and III. In line with what was said in chapter II, where I made no attempt to argue which moral position is the most feasible or conforms best to some assumed standard, the purpose here is not to present a moralist critique of the law but to merely expose its attitude and thus *enable* its critique. The end result, this is the aim, is an understanding of how a particular sphere of regulation conceives animals and where it draws the line between permissible and impermissible treatment. The concluding chapter will draw the separate spheres together and assess the moral implications of international animal law taken as a whole.

The law of natural resources

'Before 1900', writes Edith Brown Weiss, 'there were few multilateral or bilateral agreements concerning international environmental issues.' What little regulation existed was based on the

idea of unbridled sovereignty of states over the natural resources of the world.[219] In a 1962 resolution, the United Nations General Assembly stressed the 'inalienable right to all States freely to dispose of their natural wealth and resources in accordance with their national interests' and urged states to respect mutually each other's sovereignty in this regard[220]. Two years earlier, it had called for similar respect when adopting a resolution promoting the economic development of less-developed countries[221].

While, perhaps, there once was an unlimited prerogative to exploit, the long-term development of the law has seen to considerable limitations to this right[222]. Since the branch of international environmental law (in any modern sense) began to develop in the 1970's, hundreds of legal instruments pertaining to environmental issues have been adopted[223]. Today, it is axiomatic that development has to be sustainable, utilization equitable, procedures predicated on the best available technology, and so on. In many ways, the general spirit and the environmental sensibilities of modern international law are encapsulated in the ICJ's advisory opinion on nuclear weapons, where the Court observed that

> [t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment[224][,]

although in this regard the Court merely codified what had already been in development since the first half of the 20th century[225].

That said, contemporary international environmental law is still markedly anthropocentric. The 1972 Stockholm declaration, one of the founding documents of the discipline[226], stressed the need to safeguard the environment and the natural resources of the earth 'for the benefit of present and future generations'[227]. The 1992 Rio declaration was even more candid about its human bias when it stated that '[h]uman beings are at the centre of concerns for sustainable

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[219] Edith Brown Weiss, 'International environmental law: contemporary issues and the emergence of a new world order' (1992–1993) 81 Georgetown Law Journal 675.
[220] UNGA Res 1803 (XVII) (14 December 1962).
[221] UNGA Res 1515 (XV) (15 December 1960).
[222] See Birnie and Boyle (n 3) 138.
[223] See Weiss (n 219) 678–9.
[224] *Legality of the threat or use of nuclear weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 29.
[225] See eg *Trail smelter (USA v Canada)* (1938 and 1941) 3 RIAA 1905, 1965; *Corfu channel (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22.
[226] cf Erkki J Hollo, *Johdatus ympäristöoikeuteen* (3rd edn, Talentum 2009) 13–4.
[227] Declaration of the United Nations conference on the human environment (16 June 1972) UN Doc A/CONF.48/14/Rev.1, principles 1–2.

development. They are entitled to a healthy and productive life in harmony with nature.'[228] In an 'anthropocentric paradigm', as Alexander Gillespie would call it, nonhuman entities such as animals or the environment will only be protected because of their instrumental value to human beings, not because they would have value independently of their utility to others[229]. Whether this human bias of international environmental law has translated to the provisions of the UNCLOS concerning fishing is a question we will be in a better position to answer at the end of this section.

Thus far, the discussion has been concerned with natural resources in general, that is, no distinction has been made between terrestrial resources, on the one hand, and marine resources, on the other. Where territorial species dwell within the territory of any particular state, they fall entirely under the sovereignty of that state. States' jurisdiction over marine species, however, depends greatly on within which maritime zone such species are found.[230] As a good rule of thumb, the jurisdiction of states is strongest when close to their shores, the strength of their claim weakening as we move outward from their territorial waters: *exclusive* ownership transforms into *shared* ownership. It is easy to see how problems might arise where a natural resource is prima facie free to be exploited by anyone. Garrett Hardin's classical formulation of the 'tragedy of the commons' applies well to the exploitation of fishing stocks: 'free access to a free resource which no one controls and everyone can exploit leads inexorably to over-consumption, unrestrained competition, and ultimate ruin for all.'[231]

The four Geneva conventions of 1958 marked the first attempt to regulate the exploitation of marine resources by treaty law[232]. The Convention on the high seas[233] affirmed that the freedom of the high seas includes the freedom of fishing. The only restriction to this freedom was that states must have 'reasonable regard' to the interests of other states.[234] Other than this, the convention did not regulate fishing in any greater detail. Its rules, however, were supplemented by the Convention on fishing and conservation of the living resources of the

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[228] Rio declaration on environment and development (3–14 June 1992) UN Doc A/CONF.151/26 (vol I) principle 1.
[229] See Alexander Gillespie, *International environmental law, policy and ethics* (OUP 1997) 17–8.
[230] cf Birnie and Boyle (n 3) 600.
[231] Birnie and Boyle (n 3) 648. See Garrett Hardin, 'The tragedy of the commons' (1968) 162 Science 1243, 1244–5; Per Magnus Wijkman, 'Managing the global commons' (1982) 36 International Organization 511, 513; Nordström (n 23) 80–1.
[232] See Birnie and Boyle (n 3) 651.
[233] (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.
[234] Article 2.

high seas[235], which contained a number of more precise provisions for the conservation of the living resources of the high seas[236]. While these provisions undoubtedly afforded some protection to the living resources—various species of fish—themselves, article 2 of the convention made clear what the ultimate purpose behind these measures was:

> As employed in this Convention, the expression 'conservation of the living resources of the high seas' means the aggregate of the measures rendering possible the *optimum sustainable yield from those resources so as to secure a maximum supply to food and other marine products*. Conservation programmes should be formulated with a view to securing in the first place a *supply of food for human consumption*.[237]

The UNCLOS entered into force in 1994 and thereby, as between states parties, superseded the four Geneva conventions[238]. Its preamble consists of several recitals giving expression to some of the most fundamental values and aims animating its adoption. Among these are the desire to promote 'the equitable and efficient utilization' and the conservation of the resources of the seas and oceans. Another recital emphasizes that the achievement of the convention's goals 'will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole'.

Part II of the UNCLOS deals with the territorial sea and the contiguous zone. The general spirit of the regulation of territorial seas is that states are sovereign, and their sovereignty extends beyond their land territory to the adjacent belt of sea called the territorial sea, which may not exceed 12 nautical miles[239]. While the sovereignty over territorial seas must be exercised in accordance with the provisions of the UNCLOS and other rules of international law[240], part II has very little to say about states' right to exploit their natural resources. It does exclude fishing activities from innocent passage[241], and consequently permits a coastal state to regulate innocent passage with a view to conserving the living resources of the sea and preventing the infringement of its fisheries laws and regulations[242], but other than that it does not regulate a coastal state's sovereign prerogative to exploit its natural resources.

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[235] (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.
[236] See articles 1, 3–8.
[237] Article 2 (emphases added).
[238] Article 311.
[239] Articles 2(1), 3.
[240] Article 2(3).
[241] Article 19(2)(i).
[242] Article 21(1)(d)–(e).

Some guidance can be found in part XII, however. Whereas states have a sovereign right to exploit their natural resources, they have a duty to protect and preserve the marine environment[243]. The scope of this obligation, however, is largely restricted to pollution and damage caused to other states—while the convention does require states in this connection to take measures 'necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life', this latter obligation does not stand alone, but is rather to be understood in the context of part XII, which lays down a detailed regime governing the cooperation of states, monitoring and environmental assessment, and national regulation seeking to prevent pollution of the marine environment[244]. Where exploitation does not entail pollution or harm to other states, the UNCLOS does not seem to stand in the way of unlimited exploitation as long as it occurs within the territorial sea or areas landward thereof.

It is said that the vast majority of all fish are caught within 200 nautical miles from the coast[245]. Part V of the UNCLOS lays down the regime for so-called exclusive economic zones ('EEZ') and provides that states may claim an EEZ up to '200 nautical miles from the baselines from which the breadth of the territorial sea is measured[246]. Within this maritime zone, coastal states have 'sovereign rights' to explore, exploit, conserve, and manage both living and nonliving natural resources of the waters superjacent to the seabed and of the seabed and its subsoil[247]. While these rights do not amount to sovereignty proper, they place the coastal state in a considerably preferential position in comparison to other states. The coastal state must determine the maximum allowable catch of the living resources in its EEZ, and other states may exploit these resources only to the extent that the coastal state itself fails to harvest the entire allowable catch[248]. In determining the maximum allowable catch, the coastal state must take conservation and management measures to ensure that the living resources of the EEZ are not endangered by over-exploitation, that harvested species are maintained or restored to levels producing a maximum sustainable yield, and that the reproduction of non-harvested

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[243] Articles 192–3. This obligation is a more specific formulation of the 'no harm principle' expressed in the ICJ's 1996 advisory opinion (see n 224) which applies residually to marine activities in any event.
[244] Article 194. Pollution is defined further in article 1, whereby 'harm to living resources and marine life' and 'hindrance to marine activities, including fishing and other legitimate uses of the sea' are expressly mentioned.
[245] See Birnie and Boyle (n 3) 648; Malcolm D Evans, 'The law of the sea' in Malcolm D Evans (ed), *International law* (3rd edn, OUP 2010) 681.
[246] Article 57.
[247] Article 56(1)(a).
[248] Articles 61(1), 62(2).

species does not become seriously threatened.[249] Since areas now considered EEZ's were previously considered the high seas[250], the regime essentially removes most fishing from the ambit of high seas freedoms and places it under the control of the coastal state, thereby greatly reducing unregulated overfishing—at least in theory.[251]

The coastal state, as referred to above, *must* grant other states access to that surplus of its living resources it itself fails to harvest. This is a corollary of the coastal state's obligation to promote the 'objective of optimum utilization of the living resources' of the EEZ[252]. However, according to article 62(1) this obligation is 'without prejudice to article 61.' It follows, then, that the objective of optimum utilization is limited by the conservation concerns of article 61, not the other way around. Moreover, nothing in articles 61 or 62 is to the effect that the maximum allowable catch would need to conform to some minimum level of permissible exploitation. It is possible, then—at least in theory—that a coastal state decides on a virtually nonexistent total allowable catch in the interests of preserving resources.[253] How many states would be willing to do so is, of course, a wholly different question.

Certain stocks are subject to special regulation under part V. Where stocks occur within the EEZ's of multiple states, those states must cooperate to ensure the conservation of such stocks[254]. Whereas there now exists an independent treaty on highly migratory species[255] supplementing what little regulation the UNCLOS contains in this regard, the latter does lay down a general obligation to cooperate to ensure conservation and, most importantly, to promote the objective of optimum utilization[256].

Of particular importance is the fact that the UNCLOS allows parties to regulate the exploitation of marine mammals more strictly than otherwise provided for in part V. Notwithstanding the objective of optimum utilization, states may prohibit the taking of

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[249] Article 61.
[250] See article 1 of the Convention on high seas (n 233).
[251] See Nordström (n 23) 79; Birnie and Boyle (n 3) 660.
[252] Article 62(1).
[253] cf Birnie and Boyle (n 3) 660–1. I disagree with their reading of article 62(1) , which leads them to conclude that a coastal state's right *not* to exploit is 'doubtful'. If the objective of optimum utilization is indeed 'without prejudice' to the provisions of article 61, then article 62(1) is limited by article 61, as I have stated above, not the other way around. In support of my position, see Gerd Winter (ed), *Towards sustainable fisheries law : a comparative analysis* (IUCN 2009) 6.
[254] Article 63.
[255] See Agreement for the implementation of the provisions of the United Nations convention on the law of the sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.
[256] Article 64. Highly migratory species are listed in Annex I to the convention.

marine mammals *completely*—the UNCLOS, of course, does not itself directly prohibit their taking.[257] Moreover, article 65 obliges parties to cooperate to conserve marine mammals and, insofar as cetaceans are concerned, work through 'the appropriate international organizations for their conservation, management and study.' This latter obligation has been interpreted by many as referring directly to the International Whaling Commission ('IWC'), thereby obligating all member states, regardless of whether they are parties to the International convention for the regulation of whaling[258], to adhere to its regulations and to accept, most importantly, the moratorium on commercial whaling. Some states, however, dispute this interpretation, arguing that as the article refers to 'organizations' in the plural, parties remain free to discharge their obligations through other organizations they consider appropriate.[259] Article 65 also applies to the conservation and management of marine mammals in the high seas[260].

Finally, part V regulates so-called anadromous and catadromous species[261]. As a general rule, to which some exceptions apply, anadromous stocks may only be fished in waters landward of the outer limits of EEZ's, that is, they may not be caught in the high seas[262]. Catadromous species are subject to a similar restriction bar the exception: for these species, the prohibition of catching in the high seas is not qualified by economic considerations[263].

Finally, we turn to the regime of the high seas. The relevant part of the treaty in this regard is part VII, which applies to all parts of the sea all parts of the sea not included in EEZ's, territorial seas, internal waters, or archipelagic waters[264]. Much like its predecessors, the UNCLOS declares the high seas open to all states and includes the freedom of fishing in the freedom of the high seas, these freedoms restricted by the duty to have 'due regard' to the

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[257] Article 65. See Birnie and Boyle (n 3) 666.
[258] (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 65.
[259] See Simon Lyster, *International wildlife law : an analysis of international treaties concerned with the conservation of wildlife* (Grotius Publications 1985) 36; Birnie and Boyle (n 3) 667. The commercial whaling moratorium will be discussed briefly in the next section.
[260] Article 120.
[261] The UNCLOS does not define what anadromous and catadromous species are. In this regard, the convention borrows its language from ichthyology. According to George Myers, anadromous species are those that 'spend most of their lives in the sea and migrate to fresh water to breed'. Catadromous species are the exact opposite: they 'spend most of their lives in fresh water and migrate to the sea to breed'. See George S Myers, 'Usage of anadromous, catadromous and allied terms for migratory fishes' (1949) Copeia 89, 94.
[262] Article 66(3)(a). This general rule, as the remainder of the article makes clear, does not apply 'where this provision would result in economic dislocation for a State other than the State of origin.' The special protection of anadromous stocks can, therefore, be circumvented as soon as states' economic interests are at stake.
[263] Article 67(2).
[264] Article 86.

interests of other states[265]. Whereas all states have the right for their nationals to fish in the high seas[266], they also have a general obligation to take necessary measures and to cooperate with a view to conserving the living resources of the high seas[267]. Insofar as states elect to set catch quotas, they must, again, take measures towards maintaining or restoring populations of harvested species in order to produce a maximum sustainable yield and to prevent the reproduction of non-harvested species of being seriously threatened[268].

Beyond this, the convention does not specify in any greater detail what it is exactly what states must do to discharge these duties. As the bar for conserving the living resources of the high seas is thus set remarkably low, states must use their own initiative to cooperate and agree on measures and rules concerning various parts of the high seas. It has been noted, however, that when states adopt treaties to govern particular fisheries in greater detail, a common problem is that non-parties to these arrangements may nonetheless exercise their high seas freedom to fish, thereby escaping all those obligations incumbent on the voluntarily consenting states[269]. As Malcolm Evans notes, it is indeed 'difficult to resist the conclusion that problems of over-utilization ... will remain until the right to exploit ... is made conditional upon participation in a unified international regulatory framework'[270].

Turning to the moral implications of the UNCLOS, the convention, by and large, views animals as 'natural' and 'living resources'. This is not prima facie markedly different from the fact that domestic law tends to view animals as property, though it is clear that the global scale[271] of exploiting marine animals as *resources* goes far beyond any exploitation of animals as *property* within any single state. Still, the characterization of animals as resources is prejudicial to any interests or value they might be perceived as having as a matter of morals. 'Language', Joan Schaffner writes,

> is not neutral but rather shapes our perception of the world ... current terms used in the law to describe animals ... are often derogatory and shape our views of animals. Terms such as 'brutes', 'dumb creatures' and 'pests' ... denigrate animals and prevent the law from adequately accounting for their inherent value ... This

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[265] Article 87.
[266] Article 116.
[267] Articles 117–8.
[268] Article 119(1)(a)–(b).
[269] See Catherine Redgwell, 'International environmental law' in Malcolm D Evans (ed), *International law* (3rd edn, OUP 2010) 716.
[270] Evans (n 245) 682.
[271] See n 4.

> terminology implies that their only value is their worth to humans as objects of food or research.'[272]

While the UNCLOS does not 'denigrate' marine animals with any of the terms Schaffner mentions, a resource is by its very definition a means to increased utility. Taking this characterization together with the human-centered goals listed in the preamble of the UNCLOS—their emphasis is, from the outset, on economic considerations and other essentially human interests—serves to underline the convention's anthropocentrism and the fact that it regards marine animals as having instrumental value only. If this regime is to have any connection to a moral theory, it is certainly not any theory postulating inherent value or claiming that animals have rights.

That said, two exceptions distinguish certain marine animals from the remaining mass otherwise treated as mere resources. Firstly, the UNCLOS, as we saw, provides for specific rules in regard to the conservation of certain stocks and species, that is, those occurring within multiple EEZ's, the highly migratory, and the anadromous and the catadromous. Whereas the main principles of the convention apply to these species and stocks residually (eg the objective of optimum utilization), they are nonetheless the beneficiaries of some enhanced cooperation and conservation duties. Secondly, and perhaps most importantly in comparison to the general spirit of the UNCLOS, marine mammals, cetaceans in particular, enjoy preferential treatment. These 'charismatic megafauna'[273], as noted above, are exempt from the general objective of optimum utilization and are thus placed in a position much more favorable than the general mass of marine animals[274]. In this regard, the UNCLOS blends the boundary between international animal law as regulating the use of animals as resources and international animal law as protecting and conserving certain species because of their compromised status. It would seem that a single regime can, to some extent, participate in both spheres. Still, the fact that some stocks and species are mentioned separately in the convention's provisions does little to obscure the fact that they are nonetheless perceived rather instrumentally.

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[272] Schaffner, *An introduction to animals and the law* (n 7) 5.
[273] cf Birnie and Boyle (n 3) 646.
[274] It is somewhat debatable, however, whether anything in international law protects cetaceans on grounds of non-anthropocentric considerations. The preamble of the whaling convention (n 258), for example, quite expressly recognizes, inter alia, 'the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks' and that 'increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources'.

Turning from the law's conception of the animal to their treatment, the moral implications of the UNCLOS are, I believe, best understood as a combination of two elements, one being what the convention *does* provide for, the other stressing what it does *not* regulate. The above examination of the UNCLOS' provisions evidences that there is a great degree of detail in how states must reconcile exploitation and conservation in various maritime zones. In fact, the convention places such an emphasis on conservation that it would certainly be inaccurate to claim that it only embodies a right to exploit. However, for our present purposes—divining the moral implications of the law in regard to the treatment of animals—, what becomes truly relevant is the cumulative effect of the convention's provisions. The cumulative effect, I argue, amounts to a simple concession that it is permissible for humans to exploit (marine) animals as long as this is done sustainably. What the UNCLOS does not regulate, however, is the *welfare* of marine animals. Nothing in its provisions amount to any duty to ensure 'humane' treatment or abstain from 'cruelty'.

If the task, now, is to judge whether the UNCLOS can be reconciled with any particular moral or legal theory examined in chapters II and III, the theory of animal welfare (and the utilitarianism that animates it) has to be ruled out. While a welfarist conception of international animal law as it regulates the use of animals as resources would similarly be premised on an idea that it is morally permissible for humans to exploit animals, it would nonetheless introduce at least *some* safeguards to ensure the welfare of the animals involved. The UNCLOS places *no* such constraints on those utilizing the living resources of the seas, which leads me to believe that it conforms to something much more primitive than animal welfare theory. All things considered, if the UNCLOS would have to be likened to some particular moral position, I would be inclined to say that it is peculiarly Aristotelian. It clearly holds that humans may use animals—resources—for their benefit, but that seems to be the end of the matter. Assuming that the convention can be held representative of that sphere of international animal law that takes a macro-level perspective to animals and perceives them as resources, exploiting the fish of the world's oceans and seas is a simple matter of waging a 'just war'.

Protecting endangered species

Ecosystems are sensitive systems comprising both living and nonliving components that are deeply interrelated. Any change to one component may have a drastic influence on other components—remove one species completely, and the vitality of the entire ecosystem may be

jeopardized[275]. 'The loss of biodiversity has profound implications for human welfare and for the planet', writes Farhana Yamin. 'While it is difficult to quantify the actual and potential value of biodiversity, it is clear that biodiversity conservation is essential for human existence at many different levels.'[276]

Animal and plant species have become extinct as long as biological entities have existed. There is nothing unnatural about extinction per se, quite the contrary. The current rate and scale of extinction, however, is unprecedented.[277] More than eight-and-a-half hundred extinctions have been recorded during the past 500 years or so, and almost 9 000 animal species are currently listed as critically endangered, endangered, or vulnerable to extinction. 'Humans and human-related activities have been the main cause of extinctions since 1500 AD', and the level of biological diversity is about to reach an all-time low.[278] While the international community increasingly believes in the necessity of protecting biological diversity, no legal instrument protects *all* animals on a global basis[279].

Alexander Gillespie has noted that the first treaties seeking to conserve animal species can be traced back to the 19th century[280]. These earliest examples of international conservation law were motivated by a need to protect human interests—to such an extent, in fact, that these precious human interests were safeguarded by actively culling certain 'harmful' species[281]. Considering that treaty obligations are premised on the consent of their addressees[282], however, this is relatively understandable. As was discussed above, the branch of international environmental law is no older than around four decades by now. Assuming that states were not generally sensitive to environmental concerns prior to the 1970's or so, there certainly had to be something in for them to make contracting worthwhile.

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[275] See Caitlin Bratt, 'International cooperation concerning the extinction of tigers' (2013) 9 Journal of Animal and Natural Resource Law 141, 144.
[276] Yamin (n 31) 531.
[277] See ibid 532.
[278] See Rosemary Rayfuse, 'Biological resources' in Daniel Bodansky, Jutta Brunnée, and Ellen Hey (eds), *The Oxford handbook of international environmental law* (OUP 2007) 364; Gillespie, *Conservation, biodiversity and international law* (n 18) 53–4.
[279] See Gillespie, *Conservation, biodiversity and international law* (n 18) 139, 164. cf Birnie and Boyle (n 3) 600.
[280] Gillespie, *Conservation, biodiversity and international law* (n 18) 163.
[281] Bowman, 'The protection of animals under international law' (n 9) 487. cf Redgwell (n 269) 709.
[282] cf article 34 of the VCLT, which codifies the principle *pacta tertiis nec nocent nec prosunt*: treaties do not, as a general rule, create obligations or rights for third states, that is, states not parties to them. See Malgosia Fitzmaurice, 'Treaties' in Rüdiger Wolfrum (ed), *The Max Planck encyclopedia of public international law* (OUP 2012) 1077.

The sphere of international animal law under scrutiny in this section, as was noted closer to the beginning of this chapter, takes an interest in animals as representatives of *species*. While this is the starting point, practical approaches giving effect to this idea vary greatly. The CITES, as its very name suggests, focuses on regulating international trade. Some treaties, on the other hand, seek not to protect species directly, but by conserving their habitat. The Convention on wetlands of international importance especially as waterfowl habitat[283], for example, obligates parties to designate and promote the conservation of wetlands, which are considered integral to the conservation of various species of flora and fauna, waterfowl in particular[284]. The CITES is, due both to its approach and its membership, global; the Convention for the conservation of Antarctic marine living resources[285], on the other hand, applies only to a very particular part of the world, as does the Convention on the conservation of European wildlife and natural habitats[286]. A particularly peculiar conservation treaty is the Convention on biological diversity[287] ('CBD'), which obligates member states to engage in a wide range of measures in order to protect biological diversity. Not only is this treaty more holistic in its approach than perhaps any other international legal instrument, it may also be the only treaty ever to recognize the 'intrinsic value' of anything nonhuman[288].

As a matter of morals as well as politics, some species tend to inspire passion more so than others. In line with the concept of 'charismatic megafauna' that was referred to above, whales are often considered as deserving special consideration and treatment[289]. Whereas some attempts to regulate the taking of whales were made as early as under the auspices of the League of Nations[290], the central instrument governing whaling today is the International convention for the regulation of whaling[291] adopted in 1946. A historical development under the current regime was the introduction of a so-called moratorium on commercial whaling as

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283 (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245.
284 See articles 2(1), 4(1).
285 (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS 48.
286 (adopted 19 September 1979, entered into force 1 June 1982) ETS 104.
287 (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.
288 See the preamble of the convention. Whereas the English language generally allows 'inherent' and 'intrinsic' to be used interchangeably, it is not certain what exactly the CBD's use of 'intrinsic' means as a philosophical matter. Ciméa Barbato Bevilaqua seems to believe that the conservation of animals as articles of biological diversity affords them protection in their own right independently of their value to humans, see Bevilaqua (n 171) 71. Tom Regan, as has been noted in chapter II, draws a clear distinction between *inherent* and *intrinsic* value, the latter being something that attaches (externally) to a being whereas the former stems from within. See Regan (n 28) 235.
289 See Gillespie, *Conservation, biodiversity and international law* (n 18) 140–1. cf Lyster (n 259) 17; Molenaar (n 21) 35.
290 See eg International agreement for the regulation of whaling (with declaration) (adopted 8 June 1937, entered into force 7 May 1938) 190 LNTS 79.
291 (n 258).

of the 1985/1986 whaling season, which has continued to this day[292]. The moratorium essentially bans all commercial whaling by states parties by setting the commercial catch quotas for all species to which the convention applies to zero. In spite of the ban, however, the treaty does allow member states to issue permits for killing, taking, and treating whales for scientific purposes[293], a practice that has resulted in the death of more than 16 000 whales since the introduction of the moratorium[294].

There is interesting synergy between the CITES and the whaling convention. The protection of a species deemed deserving of it is, at least in theory, considerably improved if a particular species falls within the ambit of two (or more) legal instruments. With the exception of the West Greenland stock of minke whales, international trade in specimens of whale species managed by the IWC is prohibited because all of these species are currently listed in appendix I to the CITES[295]. This is not entirely uncontroversial, however; with the exception of the West Greenland stock, appendix I includes all minke whales (*Balaenoptera acutorostrata*)[296], the conservation status of which is currently identified as 'least concern'. It is certainly less problematic for the whaling convention to ban the commercial catching of minke whales since that convention does not purport to protect endangered species exclusively. But when a treaty named 'Convention on international trade in *endangered* species of wild fauna and flora' lists in what could be considered its most significant appendix a species that is abundant and nowhere near being threatened with extinction, its political credibility is at stake.

Continuing with the topic of appendices, the CITES is predicated on the idea of placing different species in different appendices depending on their degree of endangerment. Appendix I is subject to the strictest regulation and includes species 'threatened with extinction which are or may be affected by trade.'[297] Appendix II, subject to more relaxed standards, includes species that may become threatened with extinction unless trade in them is regulated[298]. The final appendix, appendix III, includes species individual member states have

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[292] IWC, 'Commercial whaling' <http://iwc.int/commercial> accessed 20 August 2014.
[293] Article VIII(1).
[294] IWC, 'Catches taken: special permit' <http://iwc.int/table_permit> accessed 20 September 2014.
[295] IWC, 'An overview of the elements/issues identified as being of importance to one or more contracting governments in relation to the future of IWC' (14 June 2011) IWC/S08/SWG 3, 70.
[296] CITES, 'Appendices' <http://www.cites.org/eng/app/appendices.php> accessed 20 August 2014.
[297] Article II(1). For a definition of what constitutes 'threatened with extinction' under the CITES, see CITES, 'Criteria for amendment of appendices I and II' (2013) Resolution 9.24, RevCop16, annex 1.
[298] Article II(2). This appendix also includes specimens that resemble species included in appendices I or II 'so that enforcement officers who encounter specimens of CITES-listed species are unlikely to be able to distinguish between them'. See CITES, 'Criteria for amendment of appendices I and II' (n 297) annex 2 b.

identified as requiring protection within their own jurisdiction[299]. The CITES is, of course, not the only conservation treaty to employ listing of protected species as a core method of regulation: other examples include the Convention on the conservation of European wildlife and natural habitats[300] and the Convention on the conservation of migratory species of wild animals[301].

As with the UNCLOS, some of the core values of the CITES, too, can be found it its preamble recitals. In keeping with the spirit of the Stockholm declaration, one recital recognizes that wild flora and fauna 'must be protected for this and the generations to come'. Another underlines the 'ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view'.

The main legal obligation of parties to the CITES is to allow trade in listed species only in accordance with the provisions of the convention[302]. This is achieved by requiring various permits and certificates, which may only be issued by management authorities the parties are obliged to designate. Management authorities work in cooperation with scientific authorities, which parties must also designate.[303] Since trade in listed species between parties to the convention is dependent on permits and certificates issued by authorities only parties to the convention will have established, trade with non-parties is prima facie impossible to reconcile with the demands of the CITES. However, it does provide for a mechanism to facilitate such trade: as long as non-parties are capable of issuing comparable documentation that substantially conforms with the requirements of the convention, parties may accept such documents in lieu of the regular permits and certificates they would require from other member states[304].

Trade in appendix I species requires both an import and an export permit. An import permit may only be issued if the import will be for purposes which are not detrimental to the survival of the species involved, the intended recipient of a living specimen is suitably equipped to

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[299] Article II(3).
[300] (n 286).
[301] (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333.
[302] Article II(4).
[303] Article IX(1).
[304] Article X.

house and care for it, and the specimen is not used for primarily commercial purposes[305]. An export permit may only be granted following an import permit. In addition, the export of a specimen must not be detrimental to the survival of its species, the specimen has to be obtained in accordance with the laws concerning protection of fauna and flora of the state of export, and a living specimen is so prepared and shipped as to minimize the risk of injury, damage to health, or cruel treatment.[306] Re-exporting[307] a specimen requires a certificate, which may only be granted if the specimen was first imported in accordance with the CITES, a living specimen is so prepared and shipped as to minimize the risk of injury, damage to health, or cruel treatment, and the intended state of import has granted an import permit[308]. The introduction of a specimen from the sea[309] also requires a certificate, which may only be granted if the introduction will not be detrimental to the survival of the species involved, the intended recipient of a living specimen is suitably equipped to house and care for it, and the specimen is not to be used for primarily commercial purposes[310].

The export of appendix II species is subject to requirements identical with appendix I species with the exception that import permits are not required[311], and the same holds true for the re-export of appendix II species[312]. Interestingly, the introduction from the sea of appendix II species follows the same rules as appendix I species insofar as the introduction must not be detrimental to the survival of the species, but the introduction certificate for appendix II species requires that the management authority is satisfied that a living specimen will be so handled as to minimize the risk of injury, damage to health, or cruel treatment whereas for appendix I species it was enough that the authority is satisfied that the intended recipient of a living specimen is suitably equipped to house and care for it. Furthermore, the introduction of appendix II species for primarily commercial purposes seems not to be prohibited; this, as was seen above, is not the case with appendix I species.[313]

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[305] See article III(3). Under the CITES regime, 'primarily commercial' should be understood broadly as any use 'whose non-commercial aspects do not clearly predominate'. See CITES, 'Fifth meeting of the conference of the parties' (23 April–3 May 1985) Doc 5.28, 462–3.
[306] See article III(2).
[307] The export of any specimen that has previously been imported, see article I(d).
[308] See article III(4).
[309] Transportation of specimens taken in the marine environment not under the jurisdiction of any state (ie the high seas), see article I(e).
[310] See article III(5).
[311] See article IV(2). Import of appendix II species requires the presentation of an export permit or re-export certificate, but not a separate permit, see article IV(4).
[312] See article IV(5).
[313] See articles III(5), IV(6).

Finally, the export of appendix III species requires an export permit, which may be granted only where the specimen was obtained in accordance with the laws concerning protection of fauna and flora of the state of export and a living specimen is so prepared and shipped as to minimize the risk of injury, damage to health, or cruel treatment[314]. The presentation of an export permit is required only where the import is from a state which has included that particular species in appendix III, otherwise a mere certificate of origin will do[315]. As with appendix II species, import permits are not required.

The convention contains a number of exceptions to the articles governing trade in appendix I, II, and III species, but none of these are of direct relevance for present purposes. In broad terms: articles III–V do not apply to specimens acquired prior to their species being listed in any of the appendices or to personal and household effects[316]; management authorities may waive the requirements of articles III–V as regards specimens used in travelling zoos, circuses, menageries, or other exhibitions[317] and; specimens bred in captivity are subject to certain exceptions[318].

Turning to the CITES' perception of animals and the moral implications thereof, by listing in appendices only those animals having unfavorable conservation status[319] and excluding all others, it essentially claims that some animals simply matter *more*. This, of course, raises the question whether endangerment is a morally relevant characteristic that justifies better (or worse) treatment. If we assume, for argument's sake, that it is, the situation becomes rather paradoxical: it is often, as was discussed at the beginning of this section, human activities that bring a species to the brink of extinction (and, unfortunately, beyond). If endangerment would be morally relevant so as to necessitate different treatment, it is peculiar how human conduct that results in endangerment of a species results in a moral duty to conserve such species—especially as the opposite seems to be that until a species becomes threatened or endangered, there exists no moral duty to conserve.

So we could take at face value that this sphere of the law, exemplified by CITES, holds that members of endangered species have particular moral significance. But there is no reason to

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[314] See article V(2).
[315] Article V(3).
[316] Articles VII(2)–(3).
[317] See article VII(7).
[318] See articles VII(4)–(5).
[319] With the exception of minke whales, as was discussed above.

believe that this would entail that these individuals and their species would have anything beyond instrumental value. A 'significant feature' of this sphere of law, as MJ Bowman has noted, is that 'the protection which [the law] extends to animals is accorded to them as representatives of a species and primarily on account of the rare, threatened or endangered state of the species'—this has already been established. However, as he continues, protection 'is not based upon the notion that animals are individual living creatures worthy of respect and consideration in their own right.'[320] As the very preamble of the CITES underlines, the purpose of protective measures relates directly to the value of wild fauna and flora 'from aesthetic, scientific, cultural, recreational and economic points of view'. All of these are *human* values: no mention is made of any *moral* value specimens might be considered to have. The conclusion seems to be that not only are animals not equal, but that those deemed worthy of protection are worth that protection solely due to their instrumental value to humans.

As for treatment, while the treaty essentially bans all commercial trade in listed species, it *does* permit non-commercial transactions. From an individual animal's perspective, this means that transportation and related measures are permissible as long as the convention's provisions—welfare standards included—are had regard to. The CITES, as noted above, places a surprising emphasis on avoiding animals being subjected to injury or cruel treatment. However, as David Favre observes, it does not explicitly define what constitutes cruel treatment for the purposes of its provisions[321]. This, as seen in chapter III, is not something particular to the CITES: animal welfare theory in general is predicated on flexible language, something that nearly always ensures that human interests prevail over the interests of animals.

At this stage it should also be noted that since this sphere of law only applies to select species, its provisions are rendered redundant in regard to most animal species in existence. Notwithstanding the treaty's concern for welfare, it is difficult to see how the CITES—or any conservation treaty, for that matter—could have more than a peripheral effect on animal exploitation as a general matter. In this regard, the fact that the CITES only applies to *trade* in

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[320] Bowman, 'The protection of animals under international law' (n 9) 488.
[321] Favre, 'An international treaty for animal welfare' (n 151) 246, fn 46. Favre seems to rest his case largely on the fact that art I of the CITES does not contain a definition of 'cruel treatment'.

endangered species limits its scope of application twice: if an animal falls outside this ambit (and most animals will), there is indeed little this sphere of conservation law will have to say.[322]

The only reasonable conclusion seems to be that CITES gives effect to an peculiar interpretation of welfarist theory. If law cannot truly be divorced from morals, as most positivists would be willing to concede, then it follows that the provisions of the CITES reflect a moral theory according to which it is permissible to use animals as tradable (non-commercial purposes only) commodities as long as safeguards—freedom from injury and 'cruel' treatment—are in place. But this sphere of the law is indeed a 'peculiar' version of welfarism. Far from comprehensive, it only applies to a relatively small amount of animals and uses, thereby not contributing greatly to any global perspective of animals' status and treatment.

The international regulation of animal welfare

Much to the chagrin of compassionate legal scholars, there currently exists no global (legally binding) instrument setting standards for animal welfare. This was the case in 1989, when MJ Bowman lamented the fact that '[t]he present situation [in relation to international animal law] leaves much to be desired', and it continues to burden the mind of David Favre, who only two years ago remarked that no international agreement currently 'ensures the welfare and protection of animals.' [323] A 'need exists for a truly global instrument with effective enforcement procedures', writes Bowman, and, as we have seen on the title page of this chapter, even the eminent Christopher Weeramantry, former judge of the ICJ, has stressed the need for the international legal order to develop 'safeguards and affirmative protection' for nonhuman life[324].

Now, animal welfare legislation is not entirely unproblematic, as we have seen. As Gary Francione and his followers would be quick to remind, the law, as it is, treats animals as rightless objects that can be sacrificed on the altar of general utility as long as virtually *any* human interest, no matter how insignificant, is satisfied in doing so. But there are other

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[322] For further reading on the welfare-aspects of the CITES, see generally Michael Bowman, 'Conflict or compatibility? The trade, conservation and animal welfare dimensions of CITES' (1998) 1 Journal of International Wildlife Law and Policy 9. See also Bowman, 'The protection of animals under international law' (n 9) 491; Alexander Gillespie, 'Humane killing: a recognition of universal common sense in international law' (2003) 6 Journal of International Wildlife Law and Policy 1, 13.

[323] Bowman, 'The protection of animals under international law' (n 9) 496; Favre, 'An international treaty for animal welfare' (n 151) 237. See also Harrop (n 208) 289.

[324] Bowman, 'The protection of animals under international law' (n 9) 496. See n 184.

concerns as well, concerns not based on moral considerations, strictly speaking. Stuart Harrop and David Bowles note that the domestic industry of states committed to a high standard of animal welfare may find it difficult to compete against cheaper imports produced under lower welfare standards since higher standards tend to entail higher production costs. 'In general', as they note, 'animal welfare costs money.'[325] Mike Radford shares their worry, adding that restrictions targeting foreign low-welfare imports may amount to an unhealthy form of cultural imperialism, states attempting to impose their moral beliefs on the rest of the world[326]. According to Gaverick Matheny and Cheryl Leah, preference of economic considerations over welfare concerns may simply lead producers to view animal death and low welfare as acceptable where improving conditions would be economically less feasible[327].

It is true that economic considerations may significantly hamper attempts to improve welfare, especially where the sought improvement is solely ethical in the sense that it tries to secure a higher standard of well-being in a manner that is at odds with what would be the most economically efficient way to exploit. It is also true, as the conclusion to chapter II serves to emphasize, that there are no universally shared moral beliefs in regard to animals. In this regard, I could refer to Anghie's work[328] once more, this time in a different manner as at the end of chapter III, to reiterate Radford's point: there is always a price to be paid for harmonizing two elements in the image of that one of them we consider better in some way. Put differently, harmonizing different cultural or religious morals in the image of enlightened European sensibilities is inherently dangerous. We will never know how native American (much less African) societies could have developed had they not been subjugated by European imperialism. Western animal lawyers would do well to remember this analogy.

This is not, of course, to say that global animal ethics should be a *laissez-faire* matter. While I have no intention to share or promote my own personal views concerning the ethics of animal exploitation in this thesis, suffice to say I am no nihilist. It is certainly possible, perhaps even desirable, to exert influence in hopes of reforming humankind's use of animals for the better. Whether this influence should be *legal* as opposed to, say, political or moral is a different matter.

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[325] Stuart Harrop and David Bowles, 'Wildlife management, the multilateral trade regime, morals and the welfare of animals' (1998) 1 Journal of International Wildlife Law and Policy 64, 71.
[326] See Radford (n 7) 137.
[327] Matheny and Leahy (n 6) 328–9, see also 325, cf 348–9.
[328] See n 183.

At any rate, some activists remain convinced that animal welfare is something that should be regulated globally through international law. Sabine Brels believes that a global instrument for animal welfare is needed to remedy an 'unsustainable insecurity in international law' and 'to provide proper guidance for animal welfare protection'[329]. David Favre has even drafted an example of what such a treaty should look like[330]. While no treaties to their liking currently exist, attempts have been made to adopt instruments akin to the Universal declaration of human rights, for example the Universal declaration on animal welfare ('UDAW') and the Universal declaration of animal rights ('UDAR'). Neither project, however, has come to fruition thus far, and scholars have been critical concerning the content of these declarations as well as what practical value they might have.[331] There is also a more recent 2011 declaration authored by and disseminated among individual activists as opposed to larger organizations[332]. Some similar attempts have taken a narrower scope: a 'Declaration of rights for cetaceans: whales and dolphins' was pronounced at Helsinki, Finland on 22 May 2010[333].

In spite of the absence of a universal treaty on animal welfare, it is hardly accurate to claim that *no* regulation of welfare exists. In this regard, David Favre is simply wrong: there *are* international agreements that ensure the welfare and protection of animals.[334] The CITES, as we have seen, makes most permits conditional upon the minimization of risk of injury and cruel treatment. The Protocol on environmental protection to the Antarctic treaty[335] provides that '[a]ll taking of native mammals and birds shall be done in the manner that involves the least degree of pain and suffering practicable.'[336] But it is true that nothing in international law currently affords protection to the welfare of *all* animals. It must be asked, however, how many states would be willing to commit to an instrument encompassing uses of animals as diverse as, say, companionship, agriculture, scientific research, and entertainment. Not all animals are equally sympathetic. Visions of comprehensive regulation of animal use become

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329 Brels (n 131) 34.
330 See Favre, 'An international treaty for animal welfare' (n 151) 265–80.
331 See generally Miah Gibson, 'The universal declaration of animal welfare' (2011) Deakin Law Review 539; Neumann (n 90). Gibson's article includes the texts of both instruments as appendices, Neumann's includes two versions (1978 and 1989) of the UDAR. For a more positive account of the UDAW, see generally Draeger (n 128).
332 See Our Planet. Theirs Too., 'The declaration of animal rights' <http://www.declarationofar.org/> accessed 20 August 2014.
333 For the text of the declaration, see 'Declaration of rights for cetaceans: whales and dolphins' (2011) 14 Journal of International Wildlife Law and Policy 75.
334 cf Favre, 'An international treaty for animal welfare' (n 151) 237.
335 (adopted 4 October 1991, entered into force 14 January 1998) 30 ILM 1455.
336 Annex II, article 3(6).

particularly problematic when they involve animals that are cherished in some parts of the world but despised in others. Again, we return to the problematics of cultural imperialism.

Before turning to the CoE treaty regarding farm animals, which is the intended case study of this section, some words have to be said on one pseudo-global mechanism for protecting animal welfare. This example also serves to showcase how free trade agreements may influence animal welfare, however unintentionally or peripherally. The General agreement on tariffs and trade[337] ('GATT'), in broad terms, seeks to remove barriers to international trade by obligating parties to treat other contracting states' exported goods equally and no less favorably than they would their own national production[338]. Much of article III deals with what are called 'like products'. If the prohibition to treat less favorably only applies to imported products that are comparable to "'like products" of national origin', it logically follows that 'unlike' products are exempt from being treated similarly: like cases should be treated alike, as the formal principle of justice is sometimes expressed[339]. The problem is that the World Trade Organization ('WTO') regime has been reluctant to hold high-welfare products as being distinguishable from low-welfare products. As long as 'unethical' animal products are physically identical to the 'ethical'—that is, imported low-welfare products cannot be distinguished from domestic high-welfare 'like products'—, high-welfare products may not be protected at the expense of low-welfare products.[340]

Since the heightened moral sensibilities of the people cannot be safeguarded by favoring some (usually domestic) products directly, recourse must be had to exceptions. Article XX of the GATT, titled 'general exceptions', permits parties to adopt and enforce measures necessary to, inter alia, protect public morals or human, animal, or plant life or health[341]. A state could, then, as a first option, impose restrictions on low-welfare imports while claiming to protect public morals. This *may* now work, as is evidenced by the fact that as recently as May 2014, the WTO Appellate Body observed that a EU ban on seal products based on moral concerns regarding

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337 (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 194.
338 See articles I(1), III(1)–(2).
339 cf Daniel Mendonça, 'Equality in the application of the law' 2 <http://www.law.yale.edu/documents/pdf/Mendonca_equality_in_the_application_of_the_law.pdf> accessed 20 September 2014.
340 See *United States—restrictions on imports of tuna* (16 June 1994) DS29/R, paras 5.8–9; Matheny and Leahy (n 6) 349–50; Radford (n 7) 133; WTO, 'Labelling' <http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm> accessed 21 August 2014.
341 Article XX(a)–(b).

seal welfare was indeed 'necessary to protect public morals'[342]. However, it is too early to judge whether this decision, in the long run, becomes the rule or remains the exception. In many ways, it seems unlikely that a trade-centered regime such as the WTO would allow its members to issue blanket bans on whatever might offend the particular moral beliefs of their peoples. Besides, what makes seals morally different from factory-farmed cattle?

Failing the public morals route, the second option would be to restrict trade in low-welfare products by subsuming the concept of animal welfare under that of animal health. Here matters get a bit more complicated. Article XX(b) is supplemented by the Agreement on the application of sanitary and phytosanitary measures[343] ('SPS agreement'), which has rightfully been described as an extension to the article[344]. The SPS agreement does not prescribe specific sanitary or phytosanitary measures—that is, measures taken to protect inter alia animal life from contaminants, toxins, pests, and diseases—, it simply lays down the rules according to which governments may develop and take such measures themselves[345]. The agreement designates the World Organization for Animal Health ('OIE') as the standard-setting agency in regard to matters pertaining to animal health[346]. A provision greatly increasing the OIE's influence over global trade is article 3(2) of the SPS agreement, pursuant to which any sanitary or phytosanitary measures conforming to the standards of the OIE will be presumed consistent with the GATT. Thus, the OIE essentially gets to determine—in the context of animal health—what constitutes a justifiable restriction to international trade and what does not.

But what of animal welfare? While the OIE has, since 2004, included animal welfare standards in its terrestrial code[347], there is no precedent in permitting states to address animal welfare concerns through article XX(b) of the GATT. In fact, there is good reason to believe that

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342 See *European Communities—measures prohibiting the importation and marketing of seal products* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, paras 5.289–90.
343 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 493.
344 Pamela A Vesilind, 'Continental drift: agricultural trade and the widening gap between European Union and United States animal welfare laws' (2010–2011) 12 Vermont Journal of Environmental Law 223, 236.
345 See Terence P Stewart and David S Johanson, 'The SPS agreement of the World Trade Organization and the international trade in dairy products' (1999) 54 Food and Drug Law Journal 55, 56.
346 Annex A, para 3(b). Note that the SPS agreement refers to the earlier name of the World Organization, which was the International Office of Epizootics, commonly abbreviated as OIE.
347 OIE, 'OIE's achievements in animal welfare' <http://www.oie.int/animal-welfare/animal-welfare-key-themes/> accessed 14 August 2014. See OIE, 'Terrestrial animal health code (2014)' <http://www.oie.int/international-standard-setting/terrestrial-code/access-online/> accessed 14 August 2014. For further reading on the OIE's work with welfare standards, see generally Sarah Kahn, 'The role of the World Organisation for Animal Health (OIE) in the development of international standards for laboratory animal welfare' (2008) 14 Alternatives to Animal Testing and Experimentation 727.

'animal health', as understood by the WTO regime, excludes 'animal welfare'. Any interest the WTO takes in animal health is, many argue, ultimately because of how animal health may affect *human* health.[348] It follows that, lacking any precedent to the contrary, animal welfare concerns *cannot* be addressed as matters of animal health under article XX(b) of the GATT. In any event, the animal welfare standards of the OIE, in and of themselves, are legally non-binding and consequently unenforceable[349]. Seemingly, then, states may protect their population from 'unethical' animal products as a matter of public morals at best: even this, as we saw above, is not certain until more states elect to test the limits of article XX(a) before WTO dispute settlement bodies.

So much for global solutions. The OIE standards lacking legal force, the most widely-ratified legally binding international instruments pertaining *directly* to the welfare of animals have been adopted under the auspices of the CoE. Its animal protection conventions were, as was said above, the first treaties to lay down 'ethical principles' for a variety of animal uses[350]. These agreements have been informed by a belief that respect for animals is part of the cultural heritage of European nations, and they are, according to the CoE itself,

> based on the principle that 'for his own well-being, man may, and sometimes must, make use of animals, but that he has a moral obligation to ensure, within reasonable limits, that the animal's health and welfare is in each case not unnecessarily put at risk.'[351]

Today, these conventions represent some of the most highly-developed animal protection instruments in existence, and they have been used in many European states as well as the EU as a yardstick for the development of animal legislation[352].

Excluding the European convention for the protection of animals kept for farming purposes[353] for now, there are five other treaty regimes governing animal use and conservation in CoE member states. Two of these, the European convention for the protection of animals

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[348] See Robert Galantucci, 'Compassionate consumerism within the GATT regime: can Belgium's ban on seal product imports be justified under article XX?' (2008–2009) 39 California Western International Law Journal 281, 304.
[349] Favre, 'An international treaty for animal welfare' (n 151) 251; Jessica Blanchett and Bruno Zeller, 'No winners in the suspension of the livestock trade with Indonesia' (2012) 14 University of Notre Dame Australia Law Review 55, 71.
[350] See n 210.
[351] See Caporale (n 210) 567; Veissier (n 209) 280; CoE, 'Biological safety use of animals by humans' <http://www.coe.int/t/e/legal_affairs/legal_co-operation/biological_safety_and_use_of_animals/Introduction.asp#TopOfPage> accessed 15 August 2014.
[352] See Caporale (n 210) 568, 576.
[353] (n 211).

for slaughter[354] and the Convention on the conservation of European wildlife and natural habitats[355], have already been referred to in this thesis. The fact that the European convention for the protection of pet animals[356] takes companion animals as its focus serves to underline the peculiarity but also the progressive character of the CoE's contribution to international animal law—no other treaties with a similar scope of application currently exist. The CoE arsenal also regulates animal testing through the European convention for the protection of vertebrate animals used for experimental and other scientific purposes[357]. Finally, while its predecessor was adopted as early as 1968, international logistics is now governed by the European convention for the protection of animals during international transport (revised)[358].

The European convention for the protection of animals kept for farming purposes[359] is said to have been inspired greatly by the German Animal Protection Law of 1972[360]. Furthermore, the committee responsible for its drafting expressly intended for it to be based on 'ethical principles'.[361] The convention applies, as its preamble also affirms, to the 'keeping, care and housing of animals, and in particular to animals in modern intensive stock-farming systems.' It goes on to define 'animals' as those 'bred or kept for the production of food, wool, skin or fur or for other farming purposes' whereas 'modern intensive stock-farming systems' are 'systems which predominantly employ technical installations operated principally by means of automatic processes.' [362] The convention's particular interest in factory farming is understandable: as we saw at the very beginning of this thesis[363], the often appalling living conditions of animals in intensive agriculture have made the practice a sworn enemy of the animal liberation movement. According to the convention's explanatory report, the possibility of extending its scope beyond farms to *all* animals was on the table, but the idea was ultimately dropped by the drafting committee[364].

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354 (n 189).
355 (n 286).
356 (adopted 13 November 1987, entered into force 1 May 1992) ETS 125.
357 (adopted 18 March 1986, entered into force 1 January 1991) ETS 123.
358 (adopted 6 November 2003, entered into force 14 March 2006) ETS 193.
359 (n 211).
360 See TierSchG.
361 CoE, 'Explanatory report' <http://conventions.coe.int/Treaty/en/Reports/Html/087.htm> accessed 20 August 2014.
362 Article 1.
363 cf n 6.
364 CoE, 'Explanatory report' (n 361).

The main provisions of the convention in regard to animal welfare are articles 3 to 7 whose principles parties must give effect to[365]. Animals must be housed and provided with food, water, and care. This rule, as are most provided in articles 3–7, is species-sensitive in that the housing and provision must be appropriate to the 'physiological and ethological needs' of the animal, which is further sensitive to scientific knowledge.[366] Restricting animals' freedom of movement in a manner that results in 'unnecessary suffering or injury' is prohibited[367]. Continuous and regular tethering and confinement, however, is permitted as long as 'appropriate' space is ensured[368].

Article 5 turns to the general living conditions of farm animals. The lighting, temperature, humidity, air circulation, ventilation, and other environmental conditions where animals are housed must conform to the convention's flexible standard of an animal's 'physiological and ethological needs in accordance with established experience and scientific knowledge'.[369] Provision of food or liquid in a manner or containing substances that may cause unnecessary suffering or injury is proscribed[370]. Finally, article 7 concerns duties to inspect. The condition and state of health of animals must be inspected at appropriate intervals to avoid unnecessary suffering. While the appropriate interval is not defined for 'regular' farm animals, those involved in factory farms must be inspected at least once a day.[371] Technical equipment used in factory farms must also be inspected at least once a day, and any discovered defects must be remedied in short order. Where defects cannot be remedied without delay, all necessary interim measures must be taken to safeguard the welfare of animals involved.[372]

Apart from articles 8 and 9, which will be discussed momentarily, the remainder of the treaty is largely irrelevant for present purposes. The only prima facie interesting fact is that the treaty remains open to states not parties to the CoE[373]. This provision has served no practical purpose, however: in the over 35 years that the convention has been in force and membership of non-CoE states thus possible, no such state has ratified the convention or acceded to it. Of some note is also the fact that there is an optional protocol to the treaty, the Protocol of

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[365] Article 2.
[366] Article 3.
[367] Article 4(1).
[368] Article 4(2).
[369] Article 5.
[370] Article 6.
[371] Article 7(1).
[372] Article 7(2).
[373] See article 15(1).

amendment to the European convention for the protection of animals kept for farming purposes[374], which, inter alia, amends article 7 of the treaty to provide rules concerning the killing of animals on a farm[375]. However, since the entry into force of the protocol is conditional upon *all* of the members to the main treaty becoming parties to the aforementioned[376], its failure to secure support has now continued for over two decades.

Since the convention is relatively short and general in its language, it is significant that a standing committee, an organ set up by the treaty[377], is empowered to adopt recommendations containing more detailed provisions in regard to the implementation of the principles[378]. The recommendations of the standing committee are binding upon the states parties: in accordance with article 9(3), parties 'shall either implement' them, or inform the committee through notifying the Secretary-General of the CoE of the reasons they have failed to do so.[379] However, article 9 contains an interesting backdoor essentially seeing to it that even a relatively inconsequential minority of member states may veto recommendations of the standing committee. If either two or more states parties or the European Economic Community (now EU) use the notification procedure of article 9(3) to notify their decision not to implement or no longer to implement a recommendation, that recommendation loses its legal effect.[380]

The standing committee has been remarkably proliferous with its recommendations. The oldest recommendation currently in force dating back to 1988, 12 recommendations are currently binding upon states parties to the convention and hand out more detailed provisions in regard to cattle, sheep, goats, domestic fowl, ratites, domestic ducks and geese, Muscovy ducks, fur animals, turkeys, pigs, and farmed fish.[381] Recommendations generally begin with a preamble, then describe the biological characteristics of the type of animal(s) in question. They then turn to more concrete provisions. The recommendation concerning farmed fish, for example, regulates in greater detail the amount and training of personnel involved in farming,

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374 (adopted 6 February 1992) ETS 145.
375 Article 5.
376 Article 7.
377 Article 8(1).
378 Article 9(1).
379 See Harrop (n 208) 293, fn 28.
380 Article 9(4).
381 CoE, 'Texts and documents' <http://www.coe.int/t/e/legal_affairs/legal_co-operation/biological_safety_and_use_of_animals/farming/A_texts_documents.asp#TopOfPage> accessed 21 August 2014.

physical characteristics of enclosures, and the transportation of specimens [382]. The recommendation on fur animals also regulates the usual objects such as inspections, enclosures, and management, but adds that animals belonging to species incapable of adapting to captivity without welfare problems may not be kept for their fur[383]. The housing of pigs, under another recommendation, is subject to detailed rules listed in appendices to the relevant instrument [384]. Finally, the recommendation concerning domestic fowl, in an appendix, provides for rules similar to the permissible methods listed in the American Veterinary Medical Association's euthanasia guidelines[385] as it regulates the killing of unwanted goslings and embryos in hatcheries[386].

In some ways, it could be argued that the structure of this chapter and the choice of treaty in this section have pre-judged the outcome: a treaty regulating animal welfare is, of course, more or less obviously animated by animal welfare theory. Yet it is one thing to hypothesize *ex ante*, another to methodically interpret an instrument against a background of characteristics familiar from incarnations of welfarist theory in animal ethics and animal law. The European convention for the protection of animals kept for farming purposes is, by and large, representative of animal welfare theory. But if anything, this section has served to discuss some of the dark sides of attempting to set global standards for the 'ethical' treatment of animals. As we saw, most attempts to do so have failed to come to fruition, and there are significant risks of cultural and religious clashes in trying to enforce globally what are largely Western moral ideas and sensibilities.

It would be a moot point to ask whether the European treaty is reconcilable with animal rights theory: of course it is not. The very premise of regulating the treatment of animals in factory farms is that it is prima facie permissible to involve animals in such conditions. Nothing about the treaty suggests aims grander than maintaining a relatively high standard of welfare while animals are used instrumentally as means to human ends. This in spite of the fact that some

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[382] See Standing committee of the European convention for the protection of animals kept for farming purposes, 'Recommendation concerning farmed fish' (5 December 2005).
[383] Standing committee of the European convention for the protection of animals kept for farming purposes, 'Recommendation concerning fur animals' (22 June 1999) article 1(4)(b).
[384] See Standing committee of the European convention for the protection of animals kept for farming purposes, 'Recommendation concerning pigs' (2 December 2004) appendices I–V.
[385] See n 55.
[386] Standing committee of the European convention for the protection of animals kept for farming purposes, 'Recommendation concerning domestic fowl (Gallus gallus)' (28 November 1995) appendix I.

theorists—which Gary Francione would term 'new welfarists'—continue to argue that animal welfare reform will, in the long run, result in the realization of animal rights[387].

The explanatory report to the treaty tells us that the drafting committee 'endeavoured to elaborate principles which are precise enough to prevent a completely free interpretation, but wide enough to allow for different needs.'[388] This conviction gives rise to one interesting implication. The treaty, as noted above, places much emphasis on the 'physiological and ethological needs' of different species. These needs, in turn, are assessed in the light of 'established experience and scientific knowledge'.[389] Now, if the physiological and ethological needs of animals are judged on the basis of established experience and scientific knowledge, then the basis for judgment is inherently susceptible to evolution. New 'best practices' develop, science continues to find new explanations for how the world functions. But if anything, most if not all of scientific research pertaining to animals has only served to emphasize the similarities between humans and animals, that is, animals, too, are capable of experiencing pain, suffering, distress, and other unenjoyable mental states. Assuming scientific knowledge increasingly tells us that our treatment of animals is not without consequences to them, what will the implications of this be? Will the interpretation of 'physiological and ethological needs', too, increasingly take into account that some practices are inherently conducive to unfavorable mental states in spite of the standard of welfare being ostensibly high?

The conclusion is that the European convention for the protection of animals kept for farming purposes, understood as representative of the sphere of animal welfare law, is largely in accordance with the core principles of animal welfare theory. It perceives animals as individuals subordinate to humans, ones that may be used exclusively as means provided inhumane and cruel treatment is proscribed[390]. Assuming the instrument examined here is a paradigm of international animal law as it governs the treatment of individual animals, then this sphere of the law shares the allegedly European belief that 'to inflict cruelty upon an

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[387] See Francione, *Rain without thunder : the ideology of the animal rights movement* (n 106) 3.
[388] CoE, 'Explanatory report' (n 361).
[389] See articles 3–5, 9.
[390] cf Standing committee of the European convention for the protection of animals kept for farming purposes, 'Recommendation concerning pigs' (2 December 2004) article 25, which provides for the emergency killing of animals.

animal—either voluntarily or through lack of care—is morally wrong and should be punished.'[391]

[391] Caporale (n 210) 569.

V CONCLUSIONS

This thesis began by asking what the ethics of international animal law are: does the law conform to moral theories pertaining to animals, and if it does, which theories and how? To answer this question, a framework had to be developed. Examining how moral philosophy and legal theories have approached the question of the animal, a vocabulary was developed to read international animal law in order to discover its moral implications. Moral theories, as discussed in chapter II, ranged from theories rejecting the moral value of animals altogether to theories positing equality and moral rights. However, it was also noted that in spite of the abundance of literature and discussion surrounding animal ethics, no theory enjoys universal acceptance. Legal approaches, as explicated in chapter III, ranged from the theory of animal welfare to that of animal rights. Yet there were also intermediary approaches, such as attempts to formulate theories of legal subjectivity that would apply to animals. Animal welfare theory, despite its flaws and shortcomings, is the contemporarily prevalent theory in domestic jurisdictions; animal rights theory has thus far failed to result in any state recognizing animals as having meaningful legal rights.

The theoretical framework fully developed, we turned to a case study of international animal law. International animal law, understood broadly as any international legal regulation pertaining to animals, is not reducible to a single, unified set of rules and principles governing animal use. Comprising phenomena as different as the utilization of the natural resources of the marine environment and the treatment of animals in agriculture, this body of law

encompasses a wide range of human behavior relating to many species of animals and many ways in which human conduct has consequences to the welfare and interests of animals. While there is prima facie little such a wide range of practices could have in common, certain characteristics have emerged as common denominators.

Law can always be systematized in one way or another. We could ask, for example, which formal source its norms flow from: treaties; the practice of states; 'general principles of law', perhaps? The approach taken in this thesis has been about systematizing in accordance with perspective—sense of scale, to be more exact. This division, I argue, best captures the relationship between a choice of perspective and the moral implications that follow.

In keeping with how different human uses of a single animal are subject to different legal characterizations and regulation in domestic jurisdictions, international animal law, in broad terms, can be understood as comprising three spheres of regulation, all of which differ in how they construe the animal. One sphere of the law regulates the use and management of the natural resources of the planet, both terrestrial and marine. This sphere, represented by the United Nations convention on the law of the sea in this thesis, understands animals as natural, living, or biological resources. This body of law, as we saw, has developed considerably since the introduction of international environmental law, and today most rules that permit exploitation are counterbalanced by duties to conserve and ensure sustainability. Still, 'sustainable' condenses well the core aims of regulation in this sphere: it is permissible, in fact *necessary*, for humans to exploit the natural resources of the planet, animals included, as long as this is done in a manner that does not compromise future availability of these same resources.

This sphere of the law, as it views animals as resources, is markedly insensitive to any belief that animals could have value independently of their utility to humans. While some exceptions to this rule exist, such as the differential treatment of marine mammals, most animals are seen as having instrumental value only. Moreover, when the law considers animals as nothing more than 'resources', it fails to ensure even a minimal standard of well-being by regulating the manner in which these resources must be exploited. Nothing in the UNCLOS or elsewhere in the law as it regulates human use of natural resources is to the effect that the treatment of these resources should be 'humane' or respectful in any other way. This serves to underline that fish, perhaps because of how they are exploited in bulk, are exempt from the moral consideration increasingly being afforded to domesticated terrestrial animals. All things considered, the moral implications of this sphere of the law were noted to be markedly

Aristotelian. Animals are clearly inferior to humans—perhaps even altogether insignificant—, and the exploitation of animals by humans is just. No side constraints, such as those peculiar to animal welfare theory, are present in this sphere.

A second sphere of international animal law takes an interest in animals as members of certain species. This sphere, largely concerned with the protection and preservation of endangered or otherwise vulnerable animals, was represented in this thesis by the Convention on international trade in endangered species of wild fauna and flora. The methods of protecting animals in this sphere of the law were noted to vary greatly. While the CITES regulates trade in endangered species, other instruments may protect the habitats of certain species, address the protection of migratory species throughout the range of their movement, or focus solely on a single species or group of animals or a very geographically limited area.

The CITES, and this body of conservation law in general, is premised on the idea that certain species of animals should be protected from over-exploitation and other conduct detrimental for their survival. The moral implication of this view is that some animals matter more than others. Ultimately, however, this body of law takes an interest in the treatment of animals because of their value for present and future human generations. If these animals are to have any kind of enhanced moral value in this sphere, it is once again predicated on their instrumental value. Moreover, this sphere of international animal law is largely peripheral to everyday concerns relating to the treatment of animals. Apart from the protection of animal habitats, which may manifest in ongoing concern for the environment, the inclusion of only those animals that have unfavorable conservation status or are otherwise in need of special protection serves to separate this sphere from those practices where humans and animals interact the most. While some parts of this law of conservation may take an interest in the welfare of individual animals and the standard of their treatment, the fact remains that any consequent human obligations trigger only in what are exceptional cases. The conclusion is that this sphere of international animal law is animated by ideas that essentially conform to the theory of animal welfare, although the effect this theory is given through the law of conservation is peculiar and markedly different from how animal welfare theory functions in domestic jurisdictions.

Finally, the third identified sphere of international animal law shifts the focus from resources and species to individual animals. This is characteristic to legal instruments that attempt to protect animal welfare. As noted, while it is continuously demanded by lawyers and activists

alike that international law should comprehensively govern animal welfare, little has developed. Apart from welfare treaties, which are rare and mostly a European phenomenon, international law's concern for animal welfare is largely incidental and arises in contexts that are far removed from the everyday interaction between humans and animals. One example of this is the CITES, where welfare standards only apply to trade in endangered species. Another example was that of the WTO regime, where concern for animal welfare may inform states' policy towards imports from states where the standard of animal welfare is low. As noted, the GATT may now in principle allow states to ban or otherwise restrict trade in low-welfare products as a matter of protecting public morals, thereby imposing their moral beliefs on other states and peoples, but it is too early to judge what the long-term impact of the WTO Appellate Body's recent decision in regard to the EU seal ban will be. Apart from protection of morals, giving effect to animal welfare concerns as a matter of animal health does not currently seem possible in international law.

As no global, legally binding standards for animal welfare exist, this sphere of international animal law was represented by a regional treaty, the European convention for the protection of animals kept for farming purposes. Regulating the environment and the conditions in which animals are to be kept in animal agriculture, the treaty was concluded to largely conform to the theory of animal welfare. It is permissible for humans to treat animals as commodities and involve them even in intensive animal farming as long as steps are taken to ensure that their treatment is humane and that they are not subjected to unnecessary suffering or injuries.

Drawing these three spheres together now, it is obvious that, as a matter pertaining to the research question of this thesis, there is no single ethics of international animal law. As the analysis taken throughout this thesis has served to underline, there is considerable variety in how contemporary human societies exploit animals for various purposes. It follows that there is also considerable variety in the moral implications of international law as it currently regulates the treatment of animals. The law pertaining to the use of natural resources is largely premised on human dominance over nonhuman life and is relatively free from moral concern to animals. The law of conservation holds some animals to matter more than others, but is not truly concerned with the moral aspects of animal treatment. If anything, its moral concern is for future generations' ability to enjoy from the aesthetic and other values associated with species now vulnerable to extinction. And international animal welfare law, if such a thing can be claimed to exist, is currently too sporadic to set global standards for the ethical treatment

of animals as a general matter. Even if it could, would it amount to anything more than a global statement of a largely Western philosophical idea that animals may be exploited as long as the ends justify the means?

Chapter III concluded that there is currently nothing in domestic jurisdictions suggesting that even some animals would have meaningful legal rights. We may now conclude the same about international animal law. The only moral implication that all of international animal law seems to share is that it holds animals valuable only in relation to their utility: animals have instrumental value, and such value only. It is obvious that animals do not have *legal* rights under international law. What seems to follow from the analysis of international animal law as a whole is that they do not have inherent value or moral rights either.

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